No. 312

In the Supreme Court of the United States

OCTOBER TERM, 1946

UNITED STATES OF AMERICA, PETITIONER,

v.

ALBERT SILK, DOING BUSINESS AS ALBERT SILK COAL COMPANY.

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

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Albert Silk, doing business as Albert Silk Coal Company, submits this brief in opposition to the petition for a writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit. The opinion of that court is now reported in 155 Fed. 2nd. 356.

STATEMENT.

This was a fact case. The findings are well supported by the evidence. There are no broad and far-reaching principles involved, and there is nothing in this case which affects the industry generally. The findings and decision are simply based upon the facts in the case. There may never be another similar case. Therefore, there is no reason to grant certiorari here.

Petitioner stresses a minor issue in the case as a ground for certiorari, as the unloaders presented only a minor question.

The principal issue in this case was whether the truckers were employees of respondent within the meaning of acts involved and the regulations issued in connection therewith. The unloaders were only incidental to the case, as the truckers were greater in number and the tax on the truckers was also greater. This court should not grant certiorari for the purpose of determining only a minor issue in a case, especially when the total amount of tax involved in this case is less than $1000.00.

THE UNLOADERS.

After making his findings of fact relative to the truckers, the trial court found as follows concerning the unloaders:

> "Plaintiff has another class of workers called unloaders. These are men who come to plaintiff's place of business and unload coal from the freight cars into bins or onto the ground, as the case may be. The unloaders come to plaintiff's yard and if there is any coal to be unloaded they are assigned a railroad car to unload and put the coal in designated places. These men work on their own time and furnish their own tools, and are paid an agreed price per ton. Plaintiff likewise does not hire these men or discharge them, and in no way controls their movements. They work as long as they wish, and quit when they wish, and are not under the direction or control of the plaintiff. Plaintiff neither has nor claims the right to

exercise any regulation or control over said unloaders, and does not actually exercise any regulation or control over them, and the relationship of employer and employee does not exist between plaintiff and said unloaders. These men also work for others at such times and on such terms as they wish, without the knowledge or consent of plaintiff." (R. 11)

When the Circuit Court of Appeals reviewed this case, it made the following comments about the unloaders:

"In addition to the truckers, the status of another class of workers, the unloaders, is involved in the appeal. The unloaders are men who come to appellee's coal yard and unload coal from cars into the bins. If when they come there is coal to unload they are assigned a car and the bin into which they are to put the coal. They furnish their own tools and are paid an agreed price per ton. They are not regular employees. They come and go as they please. They likewise work for others at times, without the knowledge or consent of appellee. The only direction given to the unloaders is as to the car assigned to them and the bin into which they are required to put the coal." (Page 358)

The evidence showed that these unloaders furnished their own tools and equipment, and worked on their own time. They were not told when to report for work or how long to work. They could work during the day time, or could work at night. The only instruction given to them by respondent was to point out the car to be unloaded and the

bin in which the coal was to be put. Some of these unloaders were known as floaters, and some of them unloaded coal for other coal yards in the city. (R. 55)

Joe Heberling testified that he was an unloader for a while. He furnished his own tools. When asked about the hours he worked, he testified "That was up to me, just how I felt." (R. 88) When asked whether he was under the direction of the yard foreman, he testified, "Well, if I wanted to listen to him. We just worked for ourselves." (R. 89) When asked if the yard foreman of respondent told him what to do, Heberling testified "He would tell us what needed to be done, and we would go ahead and do it the way we wanted to." (R. 90)

The evidence therefore amply supported the findings.

THE TRUCKERS.

Respondent originally employed regular transfer or trucking companies for his hauling. Several years before this case arose, respondent began the practice of engaging independent truckers for his hauling. (R. 29) These men are in fact independent workers who own their own equipment and trucks, and who furnish their own supplies and materials, and who work whenever they care to do so, for whomsoever they desire, and at whatever task they desire to undertake. This was not a scheme or plan by respondent to evade a tax, and no such conten-

tion has been made. Respondent had this method of delivery long before the tax in question was created. These independent truck owner drivers perform the same service which was formerly performed for respondent by the regular transfer and hauling companies.

These trucks do not bear the name, telephone number, or other insignia of respondent. The trucks are not left or stored at respondent's yard. (R. 31) Sometimes the truckers drive their own trucks, and sometimes they hire other men to drive the trucks and do the work. Respondent has nothing to do with these arrangements, and does not pay the extra help. The truck owner pays for his own help. (R. 35) The truckers would frequently not appear at respondent's yard for days at a time. They were not expected or required to give respondent notice or obtain his consent about not working. They just worked when they pleased. Sometimes they were doing work elsewhere. (R. 33). Sometimes they went hunting. (R. 65-66) Sometimes they were hauling for others. (R. 66, 73-74) This was a regular occurrence. (R. 83) Respondent had no control over them.

The Circuit Court of Appeals stated in its opinion that the truckers were under no duty to make a delivery, and, if a delivery is made, the trucker is under no duty to return to the yard, or to make further deliveries. The court further said:

"According to the testimony, appellee exercises no control over the truckers. They come

and go as they please; they are not formally hired or discharged; they are paid for whatever coal they deliver. They are paid for what they haul as they request, sometimes after each load, sometimes at the end of the day, and sometimes at the end of the week. Frequently they haul coal for other dealers, haul grain, foodstuff, furniture, wood, rock, or any other material for other merchants or for private citizens of the community. This is done without interference or control by appellee over them in any way. The truckers report for work at such hours as they may wish, leave when they wish, and come and go independently of any rules or regulations or contracts with appellee. If they do not want to haul coal, they do not report, or if they want to absent themselves for a week or two and then return, they do so. This in substance presents the relationship between appellee and the truckers.'" (p. 357)

The trial court made extensive findings of fact on the above points. (R. 9-11) Finding No. 6 on page 10 is, in part, as follows:

"According to the testimony of both the truckers and the plaintiff, the plaintiff exercises no control over the truckers. They report for work at such hours as they may wish, and they leave when they wish, and they come and go absolutely independent of any regulations, rules or contracts with Mr. Silk. They simply congregate at the plaintiff's yard and take advantage of his facilities in the hope that they will get an opportunity to haul coal to his customers who telephone plaintiff for it. ***

There are no terms of employment. The truckers are not hired or discharged formally in any

way as those terms are used in trade or in business. The testimony is that these truckers come and go as they wish. If they desire to leave early, they may do so, and they do so without the permission of or notice to the plaintiff or his assistant. They are paid by plaintiff as they request it, sometimes after each trip, sometimes at the end of each day, and sometimes at the end of each week."

Finding No. 7 on page 10 is as follows:

"The evidence discloses that in addition to the hauling said truckers do for plaintiff, they very often also haul for other parties. The evidence discloses that said truckers at such times and on such terms as they may fix haul grain, foodstuffs, furniture, coal, wood, rock and other material for citizens of the community, and all of this is done without the authorization, interference or control of the plaintiff in any way whatsoever."

Finding No. 8 on page 11 is as follows:

"Under the evidence in this case, the plaintiff neither has nor claims the right to exercise any regulation or control over these truckers, and does not actually exercise any regulation or control over them, and they are not employees of plaintiff, but are independent contractors, within the meaning of said laws. There is no relationship of employer and employee existing between them. The uncontradicted testimony of witnesses called on both sides is that there is no relation of employer and employee between plaintiff and these men. He does not hire them. He does not fire them. He simply maintains an exchange or place where these truckers with their own trucks and equipment can come and obtain delivery orders from him."

These truckers were following an independent trade or calling, and the court so found.

ARGUMENT.

NO CONFLICT EXISTS IN THE DECISIONS.

There is no conflict in the decisions as to the status of truckers who were working on the basis which existed in this case, and no such conflict is pointed out by the petitioner. Since the truckers were the main issue in this case, and there is no conflict in the decisions as to them, certiorari should not be granted.

Neither is there a conflict in the decisions as to the unloaders. This was a fact case, and the facts which were controlling in this case do not exist in any of the cases referred to by the petitioner. Those cases are easily distinguished.

Petitioner cites Grace v. Magruder, 148 F. 2d 679, where certiorari was denied by this court. That case is not in point, and has no application to the present case. There is a great difference between the work of coal hustlers and the work of the unloaders involved in this case. A coal hustler is an extra helper who accompanies the truck driver on the delivery for the purpose of carrying or wheeling the coal from the truck to the customer's coal bin. While respondent does not hire coal hustlers in his business, they are commonly used by other dealers and their duties are generally known. A coal hustler is assigned to a particular job or delivery, and

he must be ready to do the work when the delivery is made. There is no choice on his part as to when the delivery is to be made. His work is controlled entirely by the time of the delivery. Other instructions to the coal hustler are also necessary. He is instructed as to whether or not the coal is to be carried in with buckets or baskets, or whether it is to be wheeled in with a wheelbarrow. Also, in some instances it must be sprayed with water before it is put in the bin in order to avoid dust. He must also clean up the customer's yard when the work is completed. In many instances, it is necessary to unload the customer's coal on the parking and then have the coal hustler carry or wheel it to the customer's bin. Such extra duties and instructions do not apply to unloaders.

Also, it was specifically found in Grace v. Magruder that the employer not only had the right to supervise and control the coal hustlers, but that he actually exercised that right. The court said in that case that the coal hustlers worked under the "compelling supervision" of the employer. The employer in that case required the coal hustler to finish the job assigned, to get the signature of the customer, to return to the coal office and present the signed card, and receive his pay. There was no such finding in our case. In our case, both the trial court and the circuit court have specifically found that respondent neither has nor claims the right to supervise or control these workers.

Another distinction between our case and Grace v. Magruder is that in our case the truckers were the principal issue and the coal unloaders presented a secondary question, while in the Grace case the coal hustlers presented the principal issue.

Also, Regulations No. 90 and No. 91 issued by the Treasury Department which contain the definition of employer and employee were apparently not stressed in that case, as they are not referred to in the opinion. That court apparently relied almost entirely upon cases which were decided under the Fair Labor Standards Act and the National Labor Relations Act, both of which contain special definitions of the term "employment". No regulations were in existence under those acts which contained a definition of employment such as we have in this case in Regulations No. 90 and No. 91. Cases under the Fair Labor Standards Act and the National Labor Relations Act are easily distinguished from cases under the Social Security Act and Regulations No. 90 and No. 91 issued pursuant thereto, as stated in the case of Glenn v. Beard, 141 F. 2d 376. Entirely different definitions of employment are used. That court said on page 377:

> "The fact that such workers may be independent contractors does not, of itself, exclude them from the application of the Fair Labor Standards Act; they are embraced in the classification of employees, within the intendment of that statute, if they are suffered or permitted to work. *But there is no such definition or pro-*

provision relating to employment or employees in the Social Security Act."

Petitioner states that this court denied certiorari in the case of Grace v. Magruder. However, the denial of certiorari by the United States Supreme Court does not have the effect of an affirmance of the judgment sought to be reviewed. It should not be regarded as a decision on the law or the merits of the case, and it is not equivalent to an affirmance of the judgment. It does not imply an expression of opinion on the merits. It creates no inference regarding the correctness of the lower court's decision. Glick v. U. S., 93 Fed. 2nd 953; Talcott v. U. S., 23 Fed. 2nd 897.

Petitioner also cites United States v. Vogue, Inc., 145 Fed. 2d 609. An examination of the facts in that case readily distinguishes it from our case. In the Vogue case, the company furnished the workers a place to work, and furnished a part of the equipment. The workers were paid regularly each week on a commission or piece work basis. They were subject to call by the store, and handled such matters as were turned over to them. They did not have the right to reject the work offered to them, as is true in our case. They maintained regular hours, the same as other employees of the store, except in dull seasons. While the workers in the Vogue case had the right to work for outside parties, the company collected for such services from the outside parties and then paid the workers. Those facts do

not exist in our case, as Mr. Silk does not supervise any work done for other parties and does not collect for such services, and in fact has no knowledge of when or where the men are working when they are not at his place. In the Vogue case, the workers had no freedom as to whether or not they would perform the work offered to them, and they were not free to come and go of their own free will and accord. Therefore, the case is easily distinguished as the controlling facts are not comparable. The court also specifically found in the Vogue case that the employer not only had the right to direct and control the workers, but that he actually exercised it. These workers were performing the same duties for the employer in exactly the same way which they did while working on a straight wage basis instead of a piece work basis. No such facts exist in our case.

Petitioner also cites National Labor Relations Board v. Hearst Publications, 322 U. S. 111 or 64 S. Ct. 851. An examination of that case shows that it arose under a different statute than the one involved in our case, and also that different facts existed. The statute involved in the Hearst case was 49 Stat. 450, or 29 U. S. C. A. 152. That is an entirely different statute than the act under which this case arises. The Hearst case arose from the refusal of certain publishing companies to bargain collectively with a union representing the so-called news boys who distributed papers on the

streets of Los Angeles. There were several different kinds of news boys, those who bought the papers from the publishing plant and sold them about the streets, and those who had fixed places where the papers were delivered to them and sold to the public from a news stand operated every day on a full time basis by the news boys who were generally full grown men, and who devoted their full time receiving and selling the papers from the same spot day after day. These news boys who were working on a full time basis and who worked at the same place every day were the only ones held to be employees under the National Labor Relations Board Act. *All other classes of news boys were disregarded as not meeting the test for employment.* These full time news boys were under the direction and control of the newspaper company, and their activities and manner of doing business were under the direct supervision of a district manager. They were subject to discipline and discharge if they disobeyed the instructions of the district manager. They were subject to assignment to particular places or spots, and could be transferred from one place to another by order of the district manager. They received small salaries as compensation, and also a commission or profits from the sale of their newspapers, which was controlled by the price fixed by the district manager.

There is also another reason why the Hearst case is not applicable to our case. In the Hearst case, there was no special regulation defining employer

and employee or what constituted employment. However, in our case we have a definition of those terms in Articles 2 and 3 of Treasury Regulations No. 91. As stated in American Oil Company v. Fly, 135 Fed. 2nd. 491, those definitions adopt a much narrower construction of the terms.

Since the statute involved in the Hearst case is not the same statute which is involved in the Silk case, and since the facts relating to employment in the Hearst case are entirely different from those in our case, and also since we have in our case a specific regulation defining employer and employee and what constitutes employment, the Hearst case is not an authority in our case, and its implications cannot be extended to our case.

It is clear that the independent truckers in this case were not employees of respondent. In fact, the petitioner does not strongly urge that the truckers were employees. No facts existed to make them employees of respondent. See Regulations No. 90 and No. 91; 151 A. L. R. 1332; Radio City Music Hall v. United States, 135 Fed. 2nd 715; United States v. Mutual Trucking Co., 141 Fed. 2nd 655; Glenn v. Beard, 141 Fed. 2nd 376; Anglim v. Empire Star Mines Co., 129 Fed. 2nd 914.

In Anglim v. Empire Star Mines Company, 129 Fed. 2nd 914, the court held that the determination of whether an employer-employee relationship exists within the Social Security Act is to be judged not

by the presence or absence of a single evidentiary factor, but by an over-all view.

In view of the above, petitioner has wholly failed to show any conflict in the decisions.

FINDINGS ARE SUPPORTED BY EVIDENCE.

The evidence clearly supports the findings and judgment of the trial court and its affirmance by the Circuit Court of Appeals. No other conclusion could be reached from the evidence.

This court accepts findings of the District Court concurred in by the Circuit Court of Appeals, where no clear error is shown. Anderson v. Abbott, 64 S. Ct. 531 or 151 A. L. R. 1146.

It must be a strong case in which this court will set aside concurrent findings of the District Court and Circuit Court of Appeals. Goodyear Tire and Rubber Co. v. Ray-O-Vac Co., 64 S. Ct. 593.

In Mahnich v. Southern S. S. Co., 64 S. Ct. 455, this court held that a finding of seaworthiness, as regards injured seamen's right to indemnity under maritime law, is usually a "finding of fact" which the Supreme Court will not review.

Since the trial court fully and carefully tried the case, and made findings of fact which there is no evidence to contradict, and since the Circuit Court of Appeals has reviewed the case and has reached the same result, this court should accept those findings and refuse certiorari in this case.

It was held in General Talking Pictures Corporation v. Western Electric Company, 58 S. Ct. 849,

304 U. S. 175, 346, that concurrent findings of the District Court and Circuit Court of Appeals on questions of fact are not disturbed unless plainly without support in the evidence. It was also held in that case that a writ of certiorari will not be granted by the Supreme Court merely to review the evidence or inferences drawn from it.

In certiorari cases, petitioner has the burden of establishing error in the judgment which is asked to be set aside. Walling v. Jacksonville Paper Co., 63 S. Ct. 332, and Higgins v. Carr Bros. Co., 63 S. Ct. 337. Petitioner has wholly failed on this point in this case. We submit that the petitioner has not shown any error in the judgment in this case.

THE TEST OF EMPLOYMENT UNDER THE REGULATIONS.

Treasury Regulations No. 90 and No. 91, issued by the Bureau of Internal Revenue, clearly establish that to constitute the relationship of employer and employee under the act in question, the alleged employer must have control or the right of control not only as to *what* shall be done, but also as to *how* it shall be done.

Regulations 91, Article 2, page 3, provide as follows:

> "To constitute an employment the legal relationship of employer and employee must exist between the person for whom the services are performed and the individual who performs them, * * *."

Article 3 of the above regulations provides as follows:

> "ART. 3. WHO ARE EMPLOYEES.—Every individual is an employee within the meaning of Title VIII of the Act if he performs services in an employment as defined in Section 811 (b) (see Article 2).
>
> However, the relationship between the person for whom such services are performed and the individual who performs such services must as to those services be the legal relationship of employer and employee."

The regulations then set forth various illustrations of what constitutes employment under the act.

There is nothing in the rules and regulations of the department which show that a special test was required in determining what constituted employment within the act. All of the rules and regulations definitely show that the ordinary and usual meaning was applied to the term of employer and employee. Since there were no special definitions or constructions provided for, the established meaning of the terms should be used.

In 50 Am. Jur. 227 this rule of law is stated as follows:

> "Courts should be slow to impart any other than their commonly understood meaning to terms employed in the enactment of a statute, and it is the policy of the courts to avoid giving statutory phraseology in new, curious or peculiar, distorted, hidden, unusual, unnatural, strained or forced, artificial, refined, metaphysical, or subtle meaning. To the contrary, it is

> a general rule of statutory construction that words of a statute will be interpreted in their ordinary acceptation and significance and the meaning commonly attributed to them. The rule is that such words are to be given their natural received, popular, approved, and recognized meaning."

Petitioner is bound by the rules and regulations which were in effect at the time involved in this case, and should not be permitted to ask this court to apply any other test in determining whether or not the relationship of employer and employee existed.

In the case of Helvering v. Winmill, 59 Supreme Court 45, it was held:

> "Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and have the effect of law.
>
> Special provisions in treasury regulations limit the application of those of a broad and general nature relating to the same subject."

Petitioner argues that the purposes and objectives of the act in question are a part of a program to improve the economic position of workers in old age and in periods of unemployment. But petitioner has apparently overlooked the fact that the act and the above regulations contain very definite limitations as to the persons who are to receive its benefits. For instance, agricultural labor, domestic servants, persons who are self employed, and many

others are specifically exempted from the benefits of the act. As stated in some of the court decisions on this question, there are millions of workers in the United States who are not within the scope of this act, and there was clearly no legislative intention to place them within the act.

In Glenn v. Beard, 141 Fed. 2nd 376, 378, that court said that:

> "However, almost half of all the persons gainfully occupied in the United States, are excluded by Congress from the benefits of the statute. Senate Report #628, 74th Cong. 1st Session, p. 9."

It is very clear to us that there was no legislative intention to enlarge the meaning of the term "employer and employee" so as to include persons who were not actually employees. If Congress had intended to give any special meaning to the term "employment" or to the term "employer and employee", it could easily have done so, and it must be presumed that Congress would have done so had that been its intention. Since no special definition was given in the act, the usual meaning of the term "employer and employee" must be used, which does not conflict with Regulations Nos. 90 and 91.

In United States v. Mutual Trucking Co., 141 F. 2d 655, that court was considering a similar case, and in discussing the meaning of the term "employer", the court said that Congress might have given it the meaning contended for by the govern-

ment if that was what it meant, but it has not done so. The court said:

> "Congress might have provided that such a relationship should be considered an employment, but it has not done so. In fact the Senate rejected a House amendment which would have extended the coverage in the statute beyond the employment relationship. The House receded (Conference Report, August 4, 1939, to accompany House Resolution 6635, page 14), and the Act was passed with coverage limited to employees." (Page 659)

Hence, we have an interpretation made by Congress itself of the meaning of the term "employer and employee" as used in this Act.

In American Oil Co. v. Fly, 135 Fed. 2nd 491, that court said:

> "In 1939 an attempt was made in Congress to amend the Act so as to include them. The House of Representatives passed the amendment, but it was defeated in the Senate, and in conference. The amendment in terms proposed a departure from the master and servant test; its defeat must be taken as showing Congressional acquiescence in that test. The definition of employee made in the Regulations must stand." (p. 493)

Moreover, the administrative agency has adopted and published rules and regulations which explain and define the terms for the purposes of this act. (Treasury Regulations 90, Art. 205 and Treasury Regulations 91, Article 3.)

Those rules specifically provide that the words "employ", "employer", and "employee", as used

therein, are to be taken in their ordinary meaning. They further provide that:

> "Generally the relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, *not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished*. That is, an employeye is subject to the will and control of the employer not only as to *what* shall be done but *how* it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. *In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and as to the methods for accomplishing the result, he is an independent contractor, not an employee.*"

These rules were adopted and distributed by the administrative agency for the guidance of persons affected by the act. Their meaning is clear and should be followed, and they are binding on the government and upon this court.

Under these definitions, if a worker is subject to the control or direction of his alleged employer merely as to the *result* to be accomplished, and not

as to the *means* and *methods* used in accomplishing the result, he is an independent contractor, and is not an employee.

The evidence in this case, when considered in its entirety, shows that the workers were subject to the direction and control of respondent only as to the *result* to be accomplished by their work. Under the above regulations adopted by the administrative agency, this is not sufficient to make them employees. Respondent did not either direct or have the right to direct the *means* and *methods* used to accomplish the result. The evidence to which the petitioner refers is evidence only of the *result* to be accomplished by the workers, and is not evidence as to the means and methods of accomplishing it. There is absolutely no evidence in this case which shows that respondent has the right to direct or control the *means* and *methods* used by these workers in accomplishing the result. These workers have absolute freedom in the performance of their duties, and respondent neither has nor claims the right to direct or control them as to the means and methods.

CONCLUSION.

We respectfully submit that certiorari should be denied in this case.

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No. 312

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1946

UNITED STATES OF AMERICA,
Petitioner,

vs.

ALBERT SILK,
Doing Business as Albert Silk Coal Company,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

BRIEF FOR THE RESPONDENT.

KELLEY PRINTING CO., TOPEKA

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1946

No. 312

UNITED STATES OF AMERICA,
Petitioner,

vs.

ALBERT SILK,
Doing Business as Albert Silk Coal Company,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

BRIEF FOR THE RESPONDENT.

QUESTIONS PRESENTED.

1. Whether independent truck owner-drivers who deliver when, where, and for whom they please, and who are paid on a tonnage basis, and who haul many different articles for other persons, are employees of respondent taxpayer within the meaning of the Social Security

Act, being 42 U. S. C. A. 1001 et sequa, Unemployment Compensation Acts, being 42 U. S. C. A. 1101, et sequa, and the Internal Revenue Code relevant thereto.

2. Whether itinerant coal unloaders who work when and where they please for different coal yards and at other types of endeavor, and who are paid on a tonnage basis, and who perform various services for other parties, are employees of the respondent taxpayer within the meaning of the laws above referred to.

STATUTES AND REGULATIONS INVOLVED.

The statutes and regulations involved are 42 U. S. C. A. 1001, et sequa, and 42 U. S. C. A. 1101, et sequa, and Treasury Regulations Nos. 90 and 91 promulgated thereunder, which are set forth in the appendix to the brief for the United States, and are therefore not repeated here.

STATEMENT.

The respondent deems the following statement necessary in order to correct certain apparently unintentional inaccuracies and omissions in the statement contained in the brief for the United States.

As is frequently the case with respect to briefs in appellate cases which have been prepared by counsel who did not try the case in the lower court, the brief filed by opposing counsel in this case does not in our opinion give true and proper emphasis to all the controlling facts, but, instead, places undue emphasis upon isolated and incidental matters which are clearly outweighed by other considerations definitely established by the testimony.

The trial court devoted an entire day to the trial of this case, and observed the witnesses as they appeared before him. He is an able and experienced trial judge. He

made extensive findings of fact and conclusions of law which are well supported by the evidence. These findings of fact and conclusions of law, and the entire record in the case, have now been reviewed and affirmed by the Tenth Circuit Court of Appeals, as reported in 155 Federal 2nd 356. They are well supported by the evidence, and are not seriously questioned here.

A. TRUCKERS.

Respondent had been engaged in the retail coal business in the city of Topeka for more than 26 years at the time of the trial of this case. (R. 19) He has never owned or operated his own trucks. (R. 21) Originally his coal was delivered by regular transfer or trucking companies. (R. 23) In more recent years, his deliveries have been made by independent truck owner-drivers who own and furnish their own trucks, supplies, tools and equipment, and who work on their own time and employ their own helpers. (R. 21) They are paid by the ton. (R. 22) Respondent does not have any interest in the trucks, (R. 21), does not help to finance them, (R. 23), does not furnish or pay for the oil, gas, tires or repairs, or direct where the same shall be purchased. (R. 21) Respondent does not furnish licenses for them. (R. 29, 54) The trucks are not required to be left at respondent's yard (R. 24) The trucker determines for himself whether he needs a helper on a delivery, and, if the trucker needs or desires a helper, he then selects his own helper, determines his rate of pay, and actually pays the helper. Respondent has nothing whatever to do with it. (R. 22, 55) The employment of the helper by the trucker does not increase the amount which respondent pays for delivery of the coal. The truckers own and furnish their own equipment, such as shovels,

forks and wheelbarrows. (R. 23, 51) In making deliveries, the truckers select their own route of travel. (R. 23)

The trucks do not carry the name, telephone number, insignia or other information about the respondent or his business, and respondent does not require that they do so. Years back, and long before this case was in question, respondent had some truck signs made, but they have not been in use during the years involved in this case, with the possible exception that a few truckers voluntarily used those old signs for a short time in 1936. This was not done at the direction or compulsion of respondent. (R. 26, 49) It was just for a short period of time. (R. 77, 80) These were old signs that were lying around the yard at the time, and were not made or intended for these men.

Respondent enters his trucking expense on his books under the heading of "hauling". (R. 27)

The truckers come and go as they please. (R. 24) There are no regular working hours. They do not check in or out, or report to anyone. They make no arrangements with respondent about coming or going. (R. 81) They either show up sometime during the day, or they do not show up at all. They do not notify respondent as to whether they will be available or not. There are days when some of the truckers do not come to the place at all. This is a frequent occurrence. (R. 27, 28) Respondent is never sure whether he will have any trucks for his deliveries. He is embarrassed every day about promising deliveries because he cannot get enough truckers to make his deliveries. He never knows who is going to show up to make them. (R. 37, 38) The times when they came to his establishment varied. Sometimes the drivers show up early in the morning, sometimes they show up about 11 A. M. or noon, and some

times they do not come in at all. (R. 37, 38, 49, 50)

Respondent does not select the trucker who is to make a delivery. The truckers determine among themselves who will answer the next call. (R. 25) The truckers have prepared at their own volition a call system by which they determine among themselves the order in which they will have an opportunity to make deliveries. It has been referred to as a "call board". The last one in goes to the bottom of the list, and the one who has been waiting the longest is entitled to the first call. (R. 25) The truckers are not required to accept their turn when a call is received. The truckers can and frequently do refuse a delivery for any reason whatsoever, or for no reason at all. (R. 41) They exercise this right quite often. It is a common occurrence. (R. 25) Perhaps the trucker does not care to handle the type of coal which has been ordered, or that he does not care to drive the distance necessary to make the delivery, or he does not like the customer or the way in which the coal must be put in the customer's bin, or it is too late in the day for him to make the delivery. (R. 75) If that driver refuses the delivery, respondent rings again and the next man on the "call board" is offered the delivery. He may accept or reject it. (R. 76) When the trucker makes a delivery, he is not required to return to the yard. Sometimes truckers return to the yard and sometimes they do not return. They can collect their compensation after each trip, or each day, or each week, or whenever they want it. (R. 26, 40)

One trucker who had made deliveries for respondent failed to come in for further deliveries, but sent his truck with another driver who made some deliveries. Respondent did not know for sometime what had happened to the owner of the truck, or where he was working. The truck owner made no advance arrangements with re-

spondent about being away, or about the selection of the driver who would use the truck during the owner's absence. (R. 28, 54)

On another occasion, three or four truckers went away for about a week without notifying respondent or making prior arrangements with respondent, and respondent did not know where they had gone, or when they would return, and did not know until after they returned where they had been. (R. 28, 54) This was a regular occurrence. (R. 66)

Another trucker who had been making some deliveries for respondent sold his truck and went to work on a farm, and respondent had no notice of it and no arrangements were made with respondent about it. Respondent learned of it through rumors after it had taken place. (R. 28-29)

Respondent does not require the truckers to return to the yard after a delivery, (R. 26) or to stay at the yard between deliveries. If they wait at his yard for a delivery they read stories, play cards, or just sit around and talk. Respondent makes no requirement of them while they are waiting at the yard for another delivery, and does not claim the right to do so. (R. 30)

In about one per cent of the deliveries, chutes are needed or requested by the customer in unloading the coal. Sometimes the truckers will refuse to take a delivery if they do not care to use a chute. The truckers have the right to decide whether they will use a chute. On many occasions they have refused to use chutes. (R. 29-30, 43)

If wheelbarrows are needed to wheel in the coal at the place of delivery, the truckers furnish them. (R. 37)

If a customer makes a complaint about a delivery, respondent may or may not tell the trucker. All respondent can do is to tell the trucker about the complaint.

He can do nothing else. (R. 39) Sometimes the truckers corrected the matter to satisfy the complaint, and sometimes they didn't. (R. 77)

Respondent does not have written contracts with the truckers. (R. 24, 54)

Respondent has never fired or discharged any of the truckers, and does not claim that right. (R. 39, 58, 78, 79) See also findings of fact Nos. 6, 8 and 9. (R. 8-9)

These truckers haul coal for other coal dealers, and also haul grain, hay, furniture, wood, rock, sand or anything they may desire. Respondent has no control over them as to when or how they do such work, or the amount they charge for the same. Respondent has nothing to do about their compensation for such services. It is not paid through or reported to respondent in any way. (R. 25, 54)

They also hauled for the Central Coal Company, H. Morton White Coal Company, Morris Coal Company, and some of them hauled direct from the mines. (R. 54) Clayton Oldham testified that during the years in question, he hauled ice for the American Ice Company, cream and milk for the Beatrice Creamery, rockwool for the Parker Insulating Company, coal for the Central Coal Company, and rock, livestock and grain. (R. 59-60)

There is no substantial variance or conflict between the testimony of the respondent and that of the truckers about the above matters. Their testimony was supported by Paul Taylor, a man who had assisted respondent in his office during the years in question, and who was familiar with the facts, and who at the time of the trial was no longer employed by respondent but was employed in another city. He was an entirely impartial witness. (R. 48)

B. UNLOADERS.

The other persons involved in this case are known as unloaders. They work on their own time and furnish their own tools and equipment. They are paid by the ton. They are commonly referred to as floaters or itinerant workers. They unload coal at any or all of the coal yards from the railroad cars into the bins. They do not work regular hours, and come and go as they please. They may work during the day time or may work at night. They are not told when to go to work or when to quit, or when to go to meals. The only instructions given to them by respondent are that respondent points out the car to be unloaded, which has been spotted by the railroad company, and the bin where the coal is to be put. Respondent has 48 hours after a car is spotted to unload it before demurrage starts. Sometimes the same unloaders return to respondent's yard to unload other cars, and sometimes strangers who have not previously unloaded for respondent do it. (R. 43-47) When asked whether he was under the direction of respondent's yard foreman, the unloader who testified on that subject said that "they listen to the foreman if they want to", but that "they just worked for themselves." (R. 72)

B. M. Tyner, who was the witness called by the United States at the trial of this case, was asked what arrangement he had with respondent and his answer was "just the price of pay." (R. 74) He further testified that he had no understanding with respondent about following directions from anyone, and that they very seldom got orders from the yard foreman, and, if they did, sometimes they followed his directions and sometimes they did not, and that nothing happened if they disobeyed. (R. 78)

These facts and many additional facts were before the court; and amply support the decision in the case.

At the close of the evidence in the trial court, the judge informed counsel for appellant that they had failed to make a case. Counsel for appellant admitted to the court that there were some things that were not just exactly the way he thought they would go. The trial court then stated he thought an ideal relationship existed between these parties, and he thought they did not want the tax paid, and should be let alone. (R. 83)

We believe the above facts are important in this case, and we respectfully request this court to carefully consider the same.

ARGUMENT.

The method used by respondent in making deliveries of coal has been used by him during the entire time he has been in business. This was over 26 years at the time of the trial. It is not a plan developed by him after the law was enacted for the purpose of attempting to evade the tax. This fact should carry considerable weight.

The act authorizes the administrative agency to make rules and regulations, which it has done. These are Regulations 90 and 91. They are the same so far as the issues involved in this case are concerned, and were in force during the time involved in this case.

These regulations and rulings have consistently held that such truckers and unloaders as are involved herein were not employees of the coal dealer under the act in question. There were presented during the trial copies of rulings made by the administrative agency showing that the agency did not consider such persons to be employees, and had so ruled in several other cases.

Those rulings are set out in the appendix to this brief. Those rulings having been made by the administrative agency, and having been in effect during the time involved in this case, should therefore carry considerable weight in determining this case.

Appellant apparently confuses this case with cases which have arisen under the National Labor Relations Act. That is an entirely separate and distinct act, and the cases decided under it are not controlling here. That act contains a definition of employment which is very broad and all inclusive. There is no such broad definition relating to employment in the Social Security Act.

A taxpayer is entitled to great consideration in a situation of this kind. Respondent has acted in the utmost good faith. The truckers and unloaders were satisfied with this arrangement. They are not asking that the tax be paid. They were not dissatisfied and were not claiming more than they were receiving from respondent for the services they performed. They had the utmost freedom, and were not under the jurisdiction or control of respondent in any way. He neither had nor claimed the right to exercise control over them as to the method in which they performed their contracts. Any control which he had was only as to the result obtained, and not to the method or details of the job. This did not make them employees under the regulations.

When a taxpayer has carried on his business in this manner, and when the arrangement which has existed for many years meets the requirements of the regulations adopted by the agency, and also comes within the rulings announced by the agency in other cases, the taxpayer should not be held liable for the tax. He did not collect any of this tax from these men. What else was there for him to follow or adopt as a guide? He cannot go back and collect from the men who were

itinerant, and disappeared. He follows the rules. It is unjust and absurd to make him pay a tax contrary to those rules and penalize him for not levying a tax upon the owner truckers and unloaders, which under those rules laid down by this very agency he had no right to levy. These rulings were furnished to respondent through the Greater Kansas City Retail Coal Merchants Association, and he had knowledge of them at that time. Those rulings specifically exempted certain other coal dealers from the payment of these taxes during the time involved in this case. Since there are no facts in our case which distinguish it from the cases in which the rulings were made, the same exemption from taxation should apply to this respondent. It certainly would be grossly unfair and inequitable to require this respondent taxpayer in Topeka, Kansas, to pay taxes under this act, while at the same time coal dealers located in Kansas City, which is only 75 miles from Topeka, have been exempted from payment of the tax. This would constitute unfair discrimination and should not be permitted.

THE FINDINGS BY THE TRIAL COURT ARE SUPPORTED BY SUBSTANTIAL EVIDENCE, AND SHOULD BE FOLLOWED BY THIS COURT.

Appellant apparently feels that the Circuit Court did not fully consider this case and apply the proper construction to it. We find no basis for such a contention. The opinion shows that the court carefully analyzed the facts, and then referred to the act and the regulations adopted under it. The court then said that the relationship between respondent and the haulers and unloaders fails to measure up to any of the standards laid down in the act or in the regulations; that in a legal sense there is no employment; that the relationship between respon-

dent and the unloaders is not materially different from that between him and the haulers; and that the undisputed facts fail to establish such reasonable measure of direction and control over the methods and means of performing the services as is necessary to establish a legal relationship of employer and employee.

The decision of the lower courts is well supported by the facts and the law.

The evidence in this case shows that the workers were subject to the direction and control of respondent only as to the *result* to be accomplished by their work. Under the regulations, this is not sufficient to make them employees of the respondent. Respondent did not direct or have the right to direct the means and methods used to accomplish the result. The evidence to which appellant refers, when considered in its entirety along with all the other evidence in the case, is evidence only of the *result* to be accomplished, and not as to the *means* and *methods* for accomplishing it. The evidence in the case does not show that this respondent has the right to direct or control the means and methods used by these workers in accomplishing the result. In fact, we know of no comparable situation where the workers are actually as free from control and direction as they are in this case. They have absolute freedom in the performance of their duties. Respondent neither has nor claims the right to direct or control them as to the means and methods by which they do their work. The trial court heard all the evidence and made specific findings of fact and conclusions of law on these points. Those findings and conclusions have been reviewed by the Circuit Court of Appeals, 10th Circuit, and affirmed. The fact that both of the lower courts have carefully considered this case and have held in favor of respondent should carry great weight with this court. It seems to us that

this court should not and will not lightly overturn or disregard a decision that has been considered and determined by both of the lower courts in favor of this respondent.

Under the established rule, this court accepts the findings in which two courts concur, unless clear error is shown. Pick Mfg. Co., v. General Motors, 299 U. S. 3; U. S. v. Commercial Credit Co., 286 U. S. 63; and Anderson v. Abbott, 64 S. Ct. 531, or 151 A. L. R. 1146.

It must be a strong case in which this court will set aside concurrent findings of the District Court and the Circuit Court of Appeals. Goodyear Tire & Rubber Co. v. Ray-O-Vac Co., 64 S. Ct. 593.

It was held in General Talking Pictures Corporation v. Western Electric Company, 58 S. Ct. 849, 304 U. S. 175, 546, that concurrent findings of the District Court and Circuit Court of Appeals on questions of fact are not disturbed unless plainly without support in the evidence.

THE ADMINISTRATIVE AGENCY ADOPTED REGULATIONS AND MADE RULINGS THEREUNDER WHICH WERE IN EFFECT DURING THE TIME INVOLVED IN THIS CASE, AND ARE THEREFORE CONTROLLING HERE.

The Social Security Act specifically authorizes the adoption of regulations for the administration of the act. Pursuant thereto, regulations number 90 and 91 were adopted by the administrative agency, and were in force during the time involved in this case. The regulations are set forth in the appendix to the brief of appellant. The administrative agency made and announced rulings in similar cases during the time involved in this case, as shown in the appendix to our brief.

We believe appellant is now trying to ignore these established regulations and rulings, and change the same in order to include independent contractors and workers who have not heretofore been included, and who do not come within the definitions which have been and now are in effect. This should not be permitted. If any change in the definition of employment is deemed necessary in order to broaden the coverage, it is for the Congress to make that change, and not the administrative agency. It would be a most unusual and alarming situation for the appellant to be permitted to broaden in this manner the definition of employment after the Congress has specifically refused to broaden it. This administrative agency has no power to legislate. Its duties are limited. It can only administer the law as it has been enacted by the Congress, and, when Congress, with full knowledge of these administrative regulations and rulings, has refused to broaden the definition of employment by legislative enactment, that should settle the matter. We understand this to be one of the well established principles of administrative law.

The rule of law is well established that the administrative regulations and interpretations of an administrative statute are persuasive evidence of its true construction, and are entitled to respectful consideration, and should not be overruled except for weighty reasons. Helvering v. Wemmill, 59 Supreme Court 45, Cully v. Mitchell, 37 Fed. 2nd 493, Nicholas v. Richlow Mfg. Co., 126 Fed. 2nd 16, 59 C. J. 1025, and Bank v. Commissioner, 39 Fed. 2nd 58. Not only should appellant be governed and bound by its announced rulings and regulations which were in effect at the time involved in this case, but this court should recognize its potency.

THESE REGULATIONS HAVE RECEIVED CONGRESSIONAL APPROVAL.

It should also be borne in mind that there are many classes of workers who admittedly are not covered by the act. Appellant argues that the purposes and objectives of the act in question are a part of a broad congressional program to improve the economic position of those who must work for others for a living. What appellant has apparently overlooked is that there are very definite limitations in the act as to the persons who are to be covered thereby. For instance, agricultural labor is specifically excluded. Domestic servants are also specifically excluded. Certain kinds of casual labor are also outside the scope of the act. Also, persons who are self-employed are not within the terms of the act. It is very clear to us that there was no legislative intention to enlarge the meaning of the term "employment" so as to include persons who are not actually employees in the legal sense. If the Congress had intended to give any special meaning to the term "employment", or to the term "employer and employee", it could easily have done so, and it must be presumed that Congress would have done so had that been its intention. It has done so in other instances. Since no special definition of employment was given in this act, the usual meaning must be used. This is what the regulations of the department and the rulings made thereunder very definitely establish. Therefore, it seems to us that the argument advanced by appellant about the interpretation to be given in this case is without foundation.

In 1939, the Congress was considering certain amendments to the Social Security Act. One of the amendments it considered was the broadening of the definition of employment. The regulations by the department,

being Regulations 90 and 91, were in force at that time. However, the Senate Committee did not adopt a broader definition of employment, and therefore that proposal did not become a part of the law. This left the definition of employment the same, and constituted congressional approval of the regulations and rulings made thereunder. On page 12352 of the Senate Congressional Record for July 11, 1939, it is pointed out there were several proposals to modify the definition of employment. One was a proposal in the House bill for the extension of coverage to include salesmen, and pointed out that under the present law, whether a salesman is covered *depends upon the test of whether he is an employee in the legal sense.* The committee reported that it would be unwise to attempt any change at that time. This congressional report therefore specifically shows that what Congress had in mind was and is the legal test of the employer and employee relationship. This situation makes the strongest possible case of legislative approval of the prior administrative construction. Poe v. Seaborn, 282 U. S. 101, 116, and U. S. v. Ickes, 98 Fed. 2nd 271, 280.

In the case of Glenn v. Beard, 141 Fed. 2nd 376, 378, it was pointed out that almost half of all the persons gainfully occupied in the United States are excluded by Congress from the benefits of the statute. (Senate Report No. 628, 74th Cong. 1st Session, p. 9)

Several courts which have been called upon to consider the question of employment under this act have recognized the position which Congress took on the proposal to broaden the coverage, in addition to the case of Glenn v. Beard, supra.

In the case of United States v. Matual Trucking Co., 141 Fed. 2nd 655, that court was considering a similar case, and, in discussing the meaning of the term "em-

ployment", said that Congress might have provided that such a relationship should be considered an employment, but it has not done so. The court further said that:

> "Congress might have provided that such a relationship should be considered an employment, but it has not done so. In fact, the Senate rejected a House amendment which would have extended the coverage in the statute beyond the employment relationship. The House receded (Conference Report, Aug. 4, 1939, to accompany House Resolution 6635, page 14), and the Act was passed with coverage limited to employees." (Page 659)

In the case of American Oil Co. v. Fly, 135 Fed. 2nd 491, that court said:

> "In 1939 an attempt was made in Congress to amend the Act so as to include them. The House of Representatives passed the amendment; but it was defeated in the Senate, and in conference. The amendment in terms proposed a departure from the master and servant test; its defeat must be taken as showing Congressional acquiescence in that test. The definition of employee made in the Regulations must stand." (Page 493)

As stated by Mr. Justice Frankfurter in his opinion in the case of D. A. Schulte, Inc., v. Gangi, 66 S. Ct. 925,

> "For purposes of judicial enforcement, the policy of a statute should be drawn out of its terms, as nourished by their proper environment, and not, like nitrogen, out of the air. Before a hitherto familiar and socially desirable practice is outlawed, where overreaching or exploitation is not inherent in the situation, the outlawry should come from Congress. To that end, some responsibility at least for a broad hint to the courts, if not for explicitness, should be left with Congress." (Page 932)

CASE MUST BE DECIDED BY A GENERAL OVER-ALL VIEW OF FACTS.

This case must be decided by a consideration of all the facts and circumstances involved, and not by isolated or incidental matters. In any normal business transaction, the parties naturally show some spirit of cooperation in carrying out the intent and purpose of their contract. However, this cooperation should not be confused and misunderstood, and assumed to be control of the worker, when such is not the fact.

The test of whether one is an employee or an independent contractor within the Social Security Act is the degree to which the principal may intervene to control the details of the agent's performance. The employer-employee relationship under the Social Security Act is to be judged by the presence or absence of no single evidentiary factor, but by an *over-all* view. Spillson v. Smith, 147 Fed. 2nd 727. Anglim v. Empire Star Mines Co., 129 Fed. 2nd 914.

It was pointed out in Willian. v. U. S., 126 Fed. 2nd 129, 131, 132, that acts of control found to have been exercised "at times" were so indefinite and uncertain that they must give way to the uncontroverted findings which lead to an opposite result. Such facts are not controlling.

NECESSITY FOR AND EXTENT OF CONTROL.

If there is no control or the right to exercise it, then there can be no relationship of employer and employee. The right to control is a necessary element of the relationship. The trial court found that no such right existed in this case, and the Circuit Court has approved that finding.

The legal relationship of employer and employee must exist in order to create liability for this tax. To constitute the relationship of employer and employee, the employer must have control or the right of control not only as to *what* shall be done, but also as to *how* it shall be done. If the worker is subject to control only as to the *result* to be accomplished by the work, and not as to the means and methods of accomplishing the result, he is an independent contractor.

Regulations 90 and 91 specifically provide that if the worker is subject to the control or direction of the alleged employer merely as to the result to be accomplished by the work, and not as to the means and methods of accomplishing the result, he is an independent contractor.

Whether the relationship of employer and employee exists must depend upon the facts and circumstances of the particular case. Yellow Cab Co. v. Magruder, 49 Fed. Supp. 605; 141 Fed. 2nd 324.

The test in determining whether one is an independent contractor or an employee within the Social Security Act lies in the degree to which the alleged employer may intervene to control the *details* of the work. Radio City Music Hall Corporation v. U. S., 135 Fed. 2nd 715.

The test of the existence of the relationship of independent contractor is whether the one who is claimed to be an independent contractor has contracted to do the work

according to his own method and without being subject to the control of the alleged employer except as to the result of the work. Glenn v. Standard Oil Company, 148 Fed. 2nd 51.

The test of whether one is an employee or an independent contractor within the Social Security Act is the degree to which principal may intervene to control the details of the agent's performance. Spillson v. Smith, 147 F. 2nd 727.

An "employee" for federal employment tax purposes is one who meets the test of established concept of the legal relationship of employer and employee. Israelite House of David v. U. S., 58 F. Supp. 862.

The legal relationship of employer-employee must exist between person for whom services are performed and the individual who performed them. Bartels v. Birmingham, 59 F. Supp. 84.

In 144 A. L. R. 740 and also in 151 A. L. R. 1331 are annotations on the question of whether or not one who uses his own truck is an independent contractor or an employee of the concern for which he transports the goods, within the meaning of the Social Security Act. The later annotation points out that in the later cases on the question, the courts have recognized that under the circumstances present, one using his own truck to transport the goods of another was an independent contractor, rather than an employee, within the meaning of the Social Security Act.

A. The Common Law Test.

Under the Statutes and regulations governing social security and unempolyment tax, which follow the common law, "employment" means the legal relationship of employer and employee, and does not include an independent contractor. One who does not meet the tests of established concept of legal relationship of employer and employee is not an employee within the Social Security Act. The test of the existence of the relationship of independent contractor is whether the one who is claimed to be an independent contractor has contracted to do the work according to his own methods and without being subject to control of employer except as to the result of the work. If the relationship is that of independent contractor, it excludes the burden of the Social Security Tax. Many cases have announced and followed these rules, and the same have now become well established. That the common law test of employment exists under the social security law and the regulations adopted pursuant thereto is shown by the following cases: U. S. v. Mutual Trucking Co., 141 F. 2nd 655, Glenn v. Standard Oil Company, 148 F. 2nd 51, Matcovich v. Anglim, 134 F. 2nd 834, Texas Co. v. Higgins, 118 F. 2nd 636, 638, Tidwell v. U. S., 63 F. Supp. 609, Nebraska Nat. Hotel Co. v. O'Malley, 63 F. Supp. 26, Emard v. Squire, 58 F. Supp. 281, and Hirsch v. Rothensies, 56 F. Supp. 92. This is what the Congress intended, as clearly shown by page 12352 of the Senate Congressional Record for July 11, 1939, which states that whether a salesman is covered depends upon the test of whether he is an employee in the legal sense. In the case of Anglim v. Empire Star Mines Co., 129 F. 2nd 914, 917, that court pointed out that it is said that the language of the concluding paragraph of the regulations, relating

to physicians, etc., assumes that a person is not to be classed as an independent contractor unless he follows an independent vocation, offering his services to the public, but the court said that those general exclusions do not modify the tests previously outlined in the regulations, and that they were not so intended.

The evidence in our case shows that these truckers actually offered their services to the public, and hauled many other things besides coal. They not only hauled coal for many other dealers, and hauled coal direct from the mines, but they hauled rock, sand, furniture, grain, building material, and many other things. They sometimes received these calls at respondent's yard.

B. Respondent Did Not Choose Trucker for Specific Delivery.

It is uncontradicted in the evidence that respondent did not know what trucker would make any particular delivery. The truckers voluntarily set up a call board, by which the first trucker to come in was given the opportunity of taking the first delivery, and on down the line until the last trucker was required to wait until all the other truckers had been given a turn. It is also uncontradicted that the truckers would frequently refuse to take a delivery and respondent was required to ring for another trucker until he found one who would make the delivery. When respondent rang for a trucker, he had no way of knowing who that trucker would be until the man appeared in answer to the call. This fact is very significant. In the case of U. S. v. Mutual Trucking Co., 141 F. 2nd 655, 656, 659, the Circuit Court of Appeals, Sixth Circuit, held:

> "'In determining whether owner-operators of tractors and trailers were employees of trucking com-

pany so as to render company liable for social security or federal insurance contributions, that company usually did not know in advance what particular driver was to take the freight was cogent evidence that while company instructed owner-operators when and where to transport the freight it did not instruct them as to how to transport it."

The court held in that case that the relationship of employer and employee did not exist, and that there was not such control as to create the relationship of employment.

C. Right to Discharge Must Exist.

Under Regulations 90 and 91, the right to discharge is also an important factor indicating that the person possessing that right is an employer. This statement is taken from the regulations above referred to which were in effect during all the time involved in this case. The evidence was uncontradicted to the effect that respondent did not have or exercise any such right over any of these parties, and the trial court so found. See findings 6, 8 and 9. Therefore, one of the important elements of the employer-employee relationship is lacking in this case. In the case of Williams v. U. S., 126 Fed. 2nd 129, the Circuit Court of Appeals, Seventh Circuit, held that since the right to control involves the power to discharge, the relation of master and servant will not exist unless the power to discharge exists. In the case of Whalen v. Harrison, 51 Fed. Supp. 515, it was held that the relation of master and servant does not exist within the Social Security Act unless the power to discharge also exists. In the case of General Wayne Inn v. Rothensies, 47 Fed. Supp. 391, it was held that the power to hire and fire is the most significant factor

in determining this question. In the case of Texas Co. v. Higgins, 118 Fed. 2nd 636, 639, the Circuit Court of Appeals, Second Circuit, pointed out that under the regulation involved, being the same regulation involved here, the right to discharge was an important factor, and did not exist in that case. In Jones v. Goodson, 121 Fed. 2d 176, the court held that the right of discharge is a factor strongly indicating existence of the master and servant relationships. This is in accord with the general rule of law 42 A. L. R. 1406.

D. It is Not Important that Some Part of the Services May Have Been Performed on the Premises of Respondent.

In many instances, an independent contractor is called upon to perform services on the premises of another, but this fact alone does not create the relationship of employer and employee. When a house owner calls a plumber or a painting contractor to perform services on his house, the fact that the work is done on the premises does not constitute employment. The worker may still be an independent contractor.

There are several cases decided under the Social Security Act in which the services were performed on the premises of another, and the court held that this fact alone did not create the relationship of employer and employee. An example of this class of cases is Radio City Music Hall v. U. S., 135 Fed. 2nd 715, where vaudeville actors or performers put on their entertainment on the premises of the alleged employer, but the court held that this fact did not make them employees. The same ruling has been made in cases involving members of orchestras.

CASES RELIED UPON BY APPELLANT AROSE UNDER DIFFERENT LEGISLATIVE ACTS AND WERE BASED UPON DISTINCTLY DIFFERENT FACTS AND CIRCUMSTANCES, AND THEREFORE ARE NOT CONTROLLING HERE.

Our case is easily distinguished from the cases relied upon by appellant.

The case of Jones v. Goodson, 121 Fed. 2nd 176, contained many facts which were considered to be controlling in that case, but which do not exist in our case. In that case the company compelled the drivers to purchase their gas and oil from the company; the company had printed rules governing the work of the drivers and could discharge the drivers for violation of the rules; the company had the right at its option to operate the taxicabs on a percentage basis, in which event the fares collected were to be divided on a specified basis; the drivers worked on a 12 hour shift; all taxicabs carried the insignia and telephone number of the company; all drivers were required to telephone the central office hourly in order that the company might know the driver was working and his whereabouts; the drivers were required to call the company in case of an accident and to make certain other reports; and if the driver refused to make calls too many times, the company could terminate his work. These and many other facts existed in that case which are not present in our case.

In the case of United States v. Vogue, Inc., 145 Fed. 2nd 609, the controlling facts easily distinguish it from the Silk case. In the Vogue case the company furnished the workers a place to work, and furnished a part of the equipment. The workers were paid regularly each week. They were subject to call by the plaintiff, and handled such matters as were turned over to

them. They did not have the right to reject the work offered to them. They maintained regular hours, the same as other employees of the store, except in dull seasons. While the workers in the Vogue case had the right to work for outside parties, the company collected for such services from the outside parties and then paid the workers. Those facts did not exist in the Silk case. In the Vogue case, the workers had no freedom as to whether or not they would perform the work offered to them, and they were not free to come and go at their own free will and accord, and were subject to call by the company.

One of the cases on which appellant relies is Grace v. Magruder, 148 F, 2nd 679. However, that case is easily distinguished from our case. In the first place, it has no application whatever to the truckers, as there are no facts or circumstances in the Grace case comparable to the truckers in the Silk case. The truckers are the principal issues in our case, both as to numbers involved and as to the amount of the tax. The unloaders are only an incidental issue. Any comparison between the hustlers in the Grace case and the unloaders in the Silk case is only slight and incidental, if there is any comparison at all. We contend the Grace case is not in point in our case in any way, and that it has no application here. There is a great difference between the work of coal hustlers and the services performed by the unloaders in our case. A coal hustler is either an extra helper who accompanies the truck driver on the delivery for the purpose of carrying or wheeling the coal to the customer's bin, or he is a worker who is sent out by the coal dealer to the residence of the customer for the purpose of carrying or wheeling the coal to the customer's bin. A coal hustler is assigned to a particular job or delivery, and he must be ready to do

the work when the delivery is made. There is no choice on his part as to when the delivery is to be made. His work is controlled entirely by the time of the delivery. Other instructions to the coal hustler are also necessary. He is instructed as to whether he should carry in the coal with a bucket or basket, or wheel it in with a wheelbarrow. In some instances it must be sprayed to avoid dust. He must also clean up the customer's yard when the work is completed. It was specifically found in the Grace case that the employer not only had the right to supervise and control the coal hustlers, but that he actually exercised that right. The court said in that case that the men worked under the "compelling supervision" of the employer. The employer in the Grace case required the coal hustlers to finish the job assigned, to get the signature of the customer, to return to the coal office and present the signed card, and receive his pay. There are no such facts or findings in our case. The court has specifically found that the respondent, Silk, neither has nor claims the right to supervise or control these unloaders, and those findings are binding here.

Appellant apparently relies upon cases which were decided under the Fair Labor Standards Act more than on cases decided under the Social Security Act. It seems very clear to us that the two acts are separate and distinct, and that the question of coverage under the two acts is entirely different. The principal case referred to by appellant is National Labor Relations Board v. Hearst Publications, 64 S. Ct. 851. However, had the Silk and the Hearst cases arisen under the same act, still the Hearst case would not be controlling in this case since the facts are very different. For instance, in the Silk case the court has specifically found and the evidence shows that there was no right of supervision by Mr. Silk over any of these workers. There was no di-

rection or control over how the work was to be done or the means and methods for accomplishing it. In the Hearst case, there was rigid supervision by a circulation manager and also a district manager and check men or main "spot" boys in the districts who were on a salary. The newsboys' compensation consisted of the difference between the price for which they sold the papers, which was fixed by the publisher, and the price they paid for the papers, which was also fixed by the publisher. The following excerpts from pages 854 and 855 of the opinion show in more detail the exact nature of the control which was exercised over the workers in the Hearst case:

"In addition to effectively fixing the compensation respondents in a variety of ways prescribe, if not the minutiae of daily activities, at least the broad terms and conditions of work. This is accomplished largely through the supervisory efforts of the district managers, who serve as the nexus between the publishers and the newsboys. The district managers assign "spots" or corners to which the newsboys are expected to confine their selling activities. Transfers from one "spot" to another may be ordered by the district manager for reasons of discipline or efficiency or other cause. Transportation to the spots from the newspaper building is offered by each of respondents. Hours of work on the spots are determined not simply by the impersonal pressures of the market, but to a real extent by explicit instructions from the district managers. Adherence to the prescribed hours is observed closely by the district managers or other supervisory agents of the publishers. Sanctions, varying in severity from reprimand to dismissal are visited on the tardy and the delinquent. By similar super-

visory controls minimum standards of diligence and good conduct while at work are sought to be enforced. However wide may be the latitude for individual initiative beyond those standards, district managers' instructions in what the publishers apparently regard as helpful sales technique are expected to be followed. Such varied items as the manner of displaying the paper, of emphasizing current features and headlines, and of placing advertising placards, or the advantages of soliciting customers at specific stores or in the traffic lanes are among the subjects of this instruction. Moreover, newsboys are furnished with sales equipment, such as racks, boxes and change aprons, and advertising placards by the publishers. In this pattern of employment the Board found that the newsboys are an integral part of the publishers' distribution system and circulation department. And the record discloses that the newsboys and checkmen feel they are employees of the papers and respondents' supervisory employees, if not respondents themselves, regard them as such."

No such facts exist in the Silk case. The Hearst case and the Silk case are therefore easily distinguishable not only for the reason that they arise under different laws, but also for the reason that the controlling facts are not at all similar.

Two cases decided by the Circuit Court of Appeals for the 6th Circuit also make a distinction about the two acts. In the case of Walling v. American Needle Crafts, 139 Fed. 2nd 760, a case was decided by that court in 1943 under the Fair Labor Standards Act which held that certain workers were covered by that act. In 1944, the same court in the case of Glenn v. Beard, 141 Fed. 2nd 376, held that certain workers who perform practically the same services as were performed in the Wall-

ing case were not employees under the Social Security Act. In pointing out the distinction between the two acts involved, that court said on page 377 of its opinion in the case of Glenn v. Beard that:

> "In the Needlecrafts case, however, the controlling factor was the broad statutory definition of employ. '"Employ" includes to suffer or permit to work.' It was held in the case above referred to that, from the legislative history of the statute in question, and of the subsequently proposed and rejected amendments thereto, there was evinced the intention of Congress, for the purpose of fair labor standards, to treat homeworkers as any other type of employee. The fact that such workers may be independent contractors does not, of itself, exclude them from the application of the Fair Labor Standards Act; they are embraced in the classification of employees, within the intendment of that statute, if they are suffered or permitted to work. But there is no such definition or provision relating to employment or employees in the Social Security Act. Without such monition, looking to the treatment of homeworking independent contractors as employees, for a special purpose, we conclude that the homework in this case is not included within that service performed by an 'employee for his employer' which is the statutory criterion for application of the provisions of the Social Security Act."

THE PRINCIPLES OF THE HEARST CASE ARE NOT APPLICABLE UNDER THE SOCIAL SECURITY ACT.

The theme of the government's brief is found in its Specification of Error number 2, on page 9, which is as follows:

> "2. The Circuit Court of Appeals erred in failing to look to the purposes of the Social Security Act and to consider the economic facts of the relationship in holding that the persons engaged in unloading and hauling coal for the respondent were not his employees within the meaning of the Act."

If that contention be not sustained, then the whole case of the government fails. To support this contention, the government cites and relies implicitly upon National Labor Relations Board v. Hearst, 322 U. S. 111. Citations of and quotations from that opinion permeate the whole brief. The case is referred to and discussed on 16 different pages of the brief.

Without the Hearst case the brief would be like the play of Hamlet, with Hamlet not upon the stage.

It is our contention and we respectfully suggest that the Hearst case does not apply to the case at bar, for two reasons.

1. It arose under a different statute,

2. The workers involved were not comparable with those at bar.

THE STATUTE.

The statute under which the Hearst case arose, is known as the Fair Labor Standards or the National Labor Relations Act, 29 U. S. C. A. 152. The question in that case was whether or not the two groups of newsboys came within the purview of the law so as to be able to compel recognition as organized unions in bargaining with the Hearst Publications. The first question that arose was whether the state laws had any application. The Court said that both the terms and the purposes of the statute as well as the legislative history show that Congress had in mind no such patch-work plan, for securing freedom of employees organizations and of collective bargaining.

The next question was whether given the intended national uniformity, the term "employee" includes such workers as these newsboys. The court held that this must be answered primarily from the history, terms and purposes of the legislation. The Court then said "the word employee is not treated by Congress as a word of art having a definite meaning. Rather, "it takes color from the surroundings in the statute where it appears."

The Court further said that Congress on the one hand was not thinking solely of the immediate technical relation of employer and employee. It had in mind, at least some other persons than those standing in the proximate legal relation of employee to the particular employer involved in the labor dispute but a wider field than the narrow technical legal relation of master and servant, as the common law has worked this out in all its variations, and at the same time a narrower one than the entire area of rendering service to others. It rather sought to find the broad solution, one that would bring industrial peace by substituting, so far as its power could reach, the rights of workers to self-organization

and collective bargaining for the industrial strife which prevails.

Again the Court says, that the first section of the act states its purpose which is to avert the substantial obstructions to the free flow of commerce which results from strikes and other forms of industrial strife or unrest, by eliminating the causes of that unrest, and to allow employees to organize so that they could prevent those strikes by collective bargaining. The question at issue in the Hearst Case was whether or not the newsboys were employees in such a sense that they might organize in order to deal effectively with the Hearst Publications. The Court therefore says, "The mischief at which the Act is aimed and the remedies it offers are not confined exclusively to employees within the traditional legal distinction, separating them from independent contractors. Myriad forms of service relationship with infinite and subtle variations in the terms of employment blanket the nation's economy. Some are within the act, others beyond its coverage. Large numbers will fall fairly on one side or the other, by whatever tests may be applied. But intermediate, there may be many. The incidents of whose employment partake in part of the one group and part of the other in varying proportions of weight, and consequently, the legal pendulum for purposes of applying the statute swing one way or the other, depending upon the weight of this balance and its relation to the special purpose at hand."

Congress thought it necessary to create a balance of forces in certain types of economic relationships. These do not embrace only employment associations in which controversies could be limited to disputes or proper physical conduct in the performance of the services. On the contrary, Congress recognized those economic relationships cannot be fitted neatly into the containers desig-

nated employee and employer, which an earlier law had shaped for different purposes. Its reports on the bill disclosed clearly the understanding that employers and employees not in proximate relationship may be drawn into common controversies by economic forces and that the very disputes sought to be avoided might involve employees who are, at times, brought into the economic relationship with employers who are not their employers. In this light, the broad language of the Act's definition, which in terms rejects conventional limitations on such conception as employee, employer, and labor disputes leaves no doubt that its applicability is to be determined broadly in doubtful situations by underlying economic facts rather than technically and exclusively by previously established legal classification. The purpose of the act is well shown in the opinion of the National Labor Relations Board v. Blount, 131 Federal 2d 585, which is referred to in the opinion in the Hearst case on page 129 (page 60 of the Supreme Court Reporter). In the Circuit Court Report, referred to, that Court quotes Section two 2 (3) of the Act defining employee as follows: (Legislative definition)

> "The term employee shall include any employee, and shall not be limited to the employee of a particular employer, unless the act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with any current labor dispute or because of any unfair labor practice, and who has obtained any other legal and substantially equivalenf employment, but shall not include any individual employed as an agricultural baroer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse."

The Blount decision as well as the Hearst decision indicates the reason for a broad interpretation of the word employer and employee, which justifies the definition announced in the Hearst case.

THE SOCIAL SECURITY ACT.

The Social Security Act under which the Silk case is pending, is different in its purposes and its definitions from the National Labor Relations Act.

The purpose of the Social Security Act is to raise a fund from the wages of certain employees and from contributions by employers sufficient to render secure from unemployment and want of old age the beneficiaries of the fund. The beneficiaries of the fund are so limited and the exceptions and exemptions are so great that the beneficiaries are only about 50% of the persons gainfully employed in the country so that it is not a universal law but one which is cooperative and for the benefit of the limited class covered by the act. It is not a law for general public benefit but for only those classes enumerated.

There are many wide exemptions such as domestic employees, farm hands and others who are not in any way benefited by the act. It, therefore, becomes of primary importance to define and limit the terms 'employer', 'employee' and 'employed'. These statutory definitions and provisions to be found in the appendix to the government brief at pages 61 to 63, inclusive, say that under the statutes the amounts collected are to be returned to the Treasury Department and Treasury regulations issued in connection therewith are found as regulations 90 and 91 which are printed in the government's brief in full at pages 63 to 65, inclusive.

While the Treasury regulations are not part of the statutes and, of course, could not override or be in conflict with the express terms of the statute itself, the provisions therein contained are of importance and must be given great consideration in the definition of 'employer', 'employee' and 'employment'. It is significant that in regulation 90 the Treasury Department says that the words 'employ', 'employee' and 'employer' are to be taken in their ordinary meaning.

> "Generally the relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done, but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he had the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor, not an employee. *** Individuals performing services as independent contractors are not employees."

These regulations were issued early in the history of the Security Act and were in force at the time of the questions arising in this case, when the taxes were levied, and when the suit was brought to recover the taxes paid.

still remain in force, and are the pattern by which the agency is supposed to operate. The very promulgation of these regulations would seem to distinguish this case (The Silk Case) from the Hearst case. It is a different statute, the statutes are different in their purposes. In one case, no such definitions of 'employer', 'employee' and 'employment' were promulgated by the Department or Agency, and in the other case, the definitions are explicit and are in accordance with the general law regarding the legal relations between employer and employee.

The government is now asking the court to place a different and broader construction upon the statute that the Treasury Department has done and which the Congress has refused to do.

In 1939, the Congress refused to define the relationship between the owner operators of trucks like those in the Silk Case as that of employees. Such an amendment was passed by the House and rejected by the Senate. The House then receded and the bill was passed without the coverage here claimed for by the Government. The resolution was contained in the conference report of August 4, 1939, being resolution 6635 at page 14. This definite rejection of an amendment proposed, negatives the definition or interpretation now asked by the United States, and we respectfully suggest prevents the court from extending the definition suggested by the Government. This refusal on the part of Congress to interpret the law as contended for herein by the government is a complete answer to the suggestion by the Government that the Hearst case should be so extended as to be a precedent for the case at bar.

We, therefore, suggest that the difference in the laws is sufficient to distinguish the case at bar from the Hearst Case.

WORKERS INVOLVED.

Not only are the laws involved in the Hearst Case and the Silk Case different, but the workers are themselves different so that the Hearst Case is not applicable to the case at bar. The independent contractors in the case at bar have already been described and we will not repeat their status or work involved, but only suggest to the court that the workers involved in the Hearst Case belong to two classes. They are all called newsboys. One class of the newsboys was speedily disposed of as not within the definition of employees even as extended by the decision to meet the other class.

> "The papers are distributed to the consumer through a variety of channels including independent dealers, news stands, often attached to drug, grocery or confectionary stores, carriers who make home deliveries and newsboys who sell on the streets of the city and its suburbs. Only the last of these are involved in this case. The newsboys work under varying terms and conditions. They may be boot jackers selling to the general public at places other than established corners or they may sell at picked spots. They may sell only occasionally or part time or full time and they may be employed regularly and continuously or only temporarily. *The units which the board contend to be appropriate are composed of those who sell full time at established spots.* Those vendors, misnamed boys, are generally mature men dependent upon the proceeds of their sales for their sustenance and frequently supporters of families, working thus as news vendors on a regular basis often for a number of years they form a stable group

with relatively little turnover in contrast to school boys and others who sell as book jackers, temporary and casual distributors.

Overall circulation and distribution of the papers are under the general supervision of circulation managers, but for purposes of street distribution each paper has been divided into geographic districts, each district being under the direct and close supervision of the district manager. His function in the mechanics of distribution is to supply the newsboys in his district with papers which he obtains from the publisher and to turn over to the publisher the receipts which he collects from their sales, either directly or with the assistance of check men or main spot boys."

We very respectfully suggest that the Hearst case has no application to the case at bar and that the whole argument of the counsel therefore, falls to the wind.

CONCLUSION.

For the reasons herein given, it is respectfully urged that the decision of the lower court should be affirmed in its entirety.

Respectfully submitted,

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APPENDIX.

The following are copies of rulings made by the administrative agency in similar cases, and during the time involved in this case. Respondent testified that copies of these rulings had been furnished to him. These rulings were called to the attention of the trial court at the time of the oral argument, but were not introduced in evidence.

Treasury Department

July 1, 1939

Kansas Coal Co.
304 Security Bldg.
Kansas City, Mo.

Attention: Mr. Edw. C. Hanks, President

Sirs:

Reference is made to your letter dated May 23, 1939, in reply to Bureau letter dated March 14, 1939, requesting additional information for the purpose of a determination by this office of the status, under Titles VIII and IX of the Social Security Act, of truck owner-drivers who deliver coal for your Company.

It is stated that your Company enters into oral agreements with truck owner-drivers to deliver coal to various customers. Such individuals are paid on a tonnage basis, pursuant to a written agreement entered into between your Company and Local No. 541 of the International Brotherhood of Teamsters, chauffeurs, Stablemen and Helpers, a copy thereof having been forwarded with your communication. The trucks are not leased to your Company and the number necessary to make your deliveries on any particular day is dependent upon weather conditions. During the summer months you have no need for trucks, while during the rush period you may engage as many as twenty-five.

It appears that the owner-drivers pay all of the expenses incident to the operation and maintenance of their trucks. A number of the individuals in question are engaged by the Works Progress Administration and during their time off make deliveries for your Company. Also, some of the owner-drivers have ice routes or are hucksters of fruits and vegetables. The majority of these individuals solicit and haul ashes, rock, sand or other materials. It further appears that in the event your orders are not sufficient to keep the owner-drivers busy they deliver coal for other companies.

The owner-drivers are not required to report to your place of business at any specified time during the day. It appears that the drivers are given orders for deliveries in turn as their trucks arrive at your establishment. They are not required to conform to fixed hours of employment and do not perform any services for your firm other than in connection with the hauling activities. Pursuant to City Ordinance No. 5193 a copy of which was also forwarded with your letter, the trucks bear the name of your Company. You furnish the signs which are printed or painted on metal detachable plates. These plates are removed when the trucks are being used to make deliveries for other concerns. Such ordinance also provides that deliveries shall not be made before 6:00 A. M. or after 7:00 P. M. Standard time. However, the owner-drivers, within that time, may come and go as they please. The only instructions issued by you to the owner-drivers relate to the type of coal to be loaded and the addresses of the customers. The coal is chuted into the customers' bins if possible, and if not, it is dumped at the curbing. Frequently, customers engage drivers to carry the coal from the street to their bins. However, your Company does not require that those particular services be performed and therefore, you are not concerned with such arrangements. You give the owner-drivers extra copies of the delivery tickets which they are privileged to cash in at the end of each haul, day or week. When such tickets are turned in the expendi-

tures are entered into the day book as "drayage" and later posted to the ledger under the same heading. Heretofore, you have considered the owner-drivers as employees and have maintained a special social security payroll record of their payments. Forty percent of the contract drayage price was considered wages, and sixty percent truck hire and maintenance. It further appears that your Company carries contingent liability, property damage, and workmen's compensation insurance on the individuals in question. In the event a driver is discourteous to customers, addicted to drink, or repeatedly complains about hauls, you cease to give him orders for deliveries.

It is further stated that only a few of the owner-drivers engage helpers. In such event the truck owners pay the salaries of such individuals and they are not subject to your supervision with respect to the performance of their services.

Article 205 of Regulations 90, issued pursuant to Title IX of the Social Security Act, provides, in part, that the relationship of the employer and employee exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work, but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to *what* shall be done but *how* it shall be done.

Substantially similar provisions are contained in Article 3 of Regulations 91, relating to Title VIII of the Act.

You are advised that, upon the basis of the facts submitted, the Kansas Coal Company does not exercise or have the right to exercise over the owner-drivers in question, or their helpers, the direction and control contemplated by the regulations referred to above as being necessary to establish the relationship of employer and employee. Accordingly, it is held that such individuals

are not your employees for purposes of Titles VIII and IX of the Social Security Act.

Respectfully

Victor H. Self
Acting Deputy Commissioner

TREASURY DEPARTMENT
WASHINGTON

OFFICE OF
COMMISSIONER OF INTERNAL REV.

March 21, 1940

Address reply to
Commissioner of Internal Revenue
And Refer to
A&C: RR: 2-C

Hoosier Coal & Oil Co.
30th Str. & L. E. & W. R. R.,
Indianapolis, Ind.

Attention: Mr. C. A. Paul
Treasurer

Sirs:

Reference is made to your letter dated Febr. 2, 1940, submitting information for the purpose of a ruling relating to the status, under Titles VIII and IX of the Social Security Act and Subchapters A & C of Chapter 9 of the Internal Revenue Code (Federal Insurance Contributions Act and Federal Unemployment Tax Act, respectively), as amended by the Social Security Act Amendments of 1939, of truck owners who deliver coal for the Hoosier Coal & Oil Co.

The information submitted discloses that the Company enters into oral agreements with truck owners whereby they furnish drivers and trucking equipment to deliver coal from the Company's yards to the customer's bins during the burning season. The truck owners are paid

on a tonnage basis, the rate per ton depending upon the circumstances peculiar to the delivery of each load of coal. All operating expenses, including the salaries of any assistants, are borne by the truck owners. The assistants are not subject to the approval of the Company and apparently may not be dismissed by it. The truck owners also haul coal for other firms. Several of them operate ice routes, while others haul trash, dirt, building materials, etc., for contractors. The truck owners also operate their trucking equipment.

The drivers are not required to report to the Company's place of business at any specified time during the day and they are not required to conform to fixed hours of employment. Pursuant to the Indiana State Law, the trucks bear the name of the Company on signs furnished by it. The only instructions issued by the Company to the drivers relate to the type of coal to be loaded and the names and addresses of the customers. The truck owners are ordinarily paid at the end of each week for the hauling services. However, on request they can secure payment on the completion of each delivery or at the end of each day.

It is held, upon the basis of the information furnished, that the truck owners and any individuals engaged to assist them, are not employees of the Hoosier Coal & Oil Co., within the meaning of Titles VIII and IX of the Social Security Act and subchapters A and C of Chapter 9 of the Internal Revenue Code, as amended, with respect to the services which they perform in hauling coal for the Company.

Respectfully,

George J. Schoeneman
Deputy Commissioner

SUPREME COURT OF THE UNITED STATES

Nos. 312 AND 673.—OCTOBER TERM, 1946.

The United States of America, Petitioner, v. Albert Silk, Doing Business as Albert Silk Coal Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.
Carter H. Harrison, Individually and as Collector of Internal Revenue, Petitioner, v. Greyvan Lines, Inc.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[June 16, 1947.]

MR. JUSTICE REED delivered the opinion of the Court.

We consider together the above two cases. Both involve suits to recover sums exacted from businesses by the Commissioner of Internal Revenue as employment taxes on employers under the Social Security Act.[1] In both instances the taxes were collected on assessments made administratively by the Commissioner because he concluded the persons here involved were employees of the taxpayers. Both cases turn on a determination as to whether the workers involved were employees under that Act or whether they were independent contractors. Writs of certiorari were granted. — U. S. — and — U. S. —, because of the general importance in the collection of social security taxes of deciding what are the applicable

[1] Titles VIII and IX, Social Security Act, 49 Stat. 636 and 639, as repealed in part 53 Stat. 1.

See Internal Revenue Code, chap. 9, subchap. A and C.

standards for the determination of employees under the Act. Varying standards have been applied in the federal courts.[2]

Respondent in No. 312, Albert Silk, doing business as the Albert Silk Coal Co., sued the United States, petitioner, to recover taxes alleged to have been illegally assessed and collected from respondent for the years 1936 through 1939 under the Social Security Act. The taxes were levied on respondent as an employer of certain workmen some of whom were engaged in unloading railway coal cars and the others in making retail deliveries of coal by truck.

Respondent sells coal at retail in the city of Topeka, Kansas. His coalyard consists of two buildings, one for an office and the other a gathering place for workers, railroad tracks upon which carloads of coal are delivered by the railroad, and bins for the different types of coal. Respondent pays those who work as unloaders an agreed price per ton to unload coal from the railroad cars. These men come to the yard when and as they please and are assigned a car to unload and a place to put the coal. They furnish their own tools, work when they wish and work for others at will. One of these unloaders testified that he worked as regularly "as a man has to when he has to eat" but there was also testimony that some of the unloaders were floaters who came to the yard only intermittently.

Respondent owns no trucks himself but contracts with workers who own their own trucks to deliver coal at a

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[2] *Texas Co.* v. *Higgins*, 118 F. 2d 636; *Jones* v. *Goodson*, 121 F. 2d 176; *Deecy Products Co.* v. *Welch*, 124 F. 2d 592; *American Oil Co.* v. *Fly*, 135 F. 2d 491; *Glenn* v. *Beard*, 141 F. 2d 376; *Magruder* v. *Yellow Cab Co.*, 141 F. 2d 324; *United States* v. *Mutual Trucking Co.*, 141 F. 2d 655; *Glenn* v. *Standard Oil Co.*, 148 F. 2d 51, 53; *McGowan* v. *Lazeroff*, 148 F. 2d 512; *United States* v. *Wholesale Oil Co.*, 154 F. 2d 745; *United States* v. *Vogue, Inc.*, 145 F. 2d 609, 612; *United States* v. *Aberdeen Aerie, No. 24*, 148 F. 2d 655, 658; *Grace* v. *Magruder*, 148 F. 2d 679, 680–81; *Nevins, Inc.* v. *Rothensies*, 151 F. 2d 189.

uniform price per ton. This is paid to the trucker by the respondent out of the price he receives for the coal from the customer. When an order for coal is taken in the company office, a bell is rung which rings in the building used by the truckers. The truckers have voluntarily adopted a call list upon which their names come up in turn, and the top man on the list has an opportunity to deliver the coal ordered. The truckers are not instructed how to do their jobs, but are merely given a ticket telling them where the coal is to be delivered and whether the charge is to be collected or not. Any damage caused by them is paid for by the company. The District Court found that the truckers could and often did refuse to make a delivery without penalty. Further, the court found that the truckers may come and go as they please and frequently did leave the premises without permission. They may and did haul for others when they pleased. They pay all the expenses of operating their trucks, and furnish extra help necessary to the delivery of the coal and all equipment except the yard storage bins. No record is kept of their time. They are paid after each trip, at the end of the day or at the end of the week, as they request.

The Collector ruled that the unloaders and truckers were employees of the respondent during the years 1936 through 1939 within the meaning of the Social Security Act and he accordingly assessed additional taxes under Titles VIII and IX of the Social Security Act and Subchapters A and C of Chapter 9 of the Internal Revenue Code. Respondent filed a claim for a refund which was denied. He then brought this action. Both the District Court and the Circuit Court of Appeals[1] thought that the truckers and unloaders were independent contractors and allowed the recovery.

[1] 135 F. 2d 356.

Respondent in No. 673, Greyvan Lines, Inc., a common carrier by motor truck, sued the petitioner, a Collector of Internal Revenue, to recover employment taxes alleged to have been illegally assessed and collected from it under similar provisions of the Social Security Act involved in Silk's case for the years or parts of years 1937 through the first quarter of 1942. From a holding for the respondent in the District Court petitioner appealed. The Circuit Court of Appeals affirmed. The chief question in this case is whether truckmen who perform the actual service of carrying the goods shipped by the public are employees of the respondent. Both the District Court and the Circuit Court of Appeals[1] thought that the truckmen were independent contractors.

The respondent operates its trucking business under a permit issued by the Interstate Commerce Commission under the "grandfather clause" of the Motor Carrier Act. 32 M. C. C. 719, 723. It operates throughout thirty-eight states and parts of Canada, carrying largely household furniture. While its principal office is in Chicago, it maintains agencies to solicit business in many of the larger cities of the areas it serves, from which it contracts to move goods. As early as 1930, before the passage of the Social Security Act, the respondent adopted the system of relations with the truckmen here concerned, which gives rise to the present issue. The system was based on contracts with the truckmen under which the truckmen were required to haul exclusively for the respondent and to furnish their own trucks and all equipment and labor necessary to pick up, handle and deliver shipments, to pay all expenses of operation, to furnish all fire, theft, and collision insurance which the respondent might specify, to pay for all loss or damage to shipments and to indemnify the company for any loss caused it by the acts of the

[1] 156 F. 2d 412.

truckmen, their servants and employees, to paint the designation "Greyvan Lines" on their trucks, to collect all money due the company from shippers or consignees, and to turn in such moneys at the office to which they report after delivering a shipment, to post bonds with the company in the amount of $1,000 and cash deposits of $250 pending final settlement of accounts, to personally drive their trucks at all times or be present on the truck when a competent relief driver was driving (except in emergencies, when a substitute might be employed with the approval of the company), and to follow all rules, regulations, and instructions of the company. All contracts or bills of lading for the shipment of goods were to be between the respondent and the shipper. The company's instructions covered directions to the truckmen as to where and when to load freight. If freight was tendered the truckmen, they were under obligation to notify the company so that it could complete the contract for shipment in its own name. As remuneration, the truckmen were to receive from the company a percentage of the tariff charged by the company varying between 50 and 52% and a bonus up to 3% for satisfactory performance of the service. The contract was terminable at any time by either party. These truckmen were required to take a short course of instruction in the company's methods of doing business before carrying out their contractual obligations to haul. The company maintained a staff of dispatchers who issued orders for the truckmen's movements, although not the routes to be used, and to which the truckmen, at intervals, reported their positions. Cargo insurance was carried by the company. All permits, certificates and franchises "necessary to the operation of the vehicle in the service of the company as a motor carrier under any Federal or State Law" were to be obtained at the company's expense.

The record shows the following additional undisputed facts, not contained in the findings. A manual of instructions, given by the respondent to the truckmen, and a contract between the company and Local No. 711 of the International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America were introduced in evidence. It suffices to say that the manual purported to regulate in detail the conduct of the truckmen in the performance of their duties, and that the agreement with the Union provided that any truckman must first be a member of the union, and that grievances would be referred to representatives of the company and the union. A company official testified that the manual was impractical and that no attempt was made to enforce it. We understand the union contract was in effect. The company had some trucks driven by truckmen who were admittedly company employees. Operations by the company under the two systems were carried out in the same manner. The insurance required by the company was carried under a blanket company policy for which the truckmen were charged proportionately.

The Social Security Act of 1935 was the result of long consideration by the President and Congress of the evil of the burdens that rest upon large numbers of our people because of the insecurities of modern life, particularly old age and unemployment. It was enacted in an effort to coordinate the forces of government and industry for solving the problems.[5] The principal method adopted by Congress to advance its purposes was to provide for periodic payments in the nature of annuities to the

[5] Message of the President, January 17, 1935, and Report of the Committee on Economic Security, H. Doc. No. 81, 74th Cong., 1st Sess.; S. Rep. No. 628, 74th Cong., 1st Sess.; S. Rep. No. 734, 76th Cong., 1st Sess.; H. Rep. No. 615, 74th Cong., 1st Sess.; H. Rep. No. 728, 76th Cong., 1st Sess. *Steward Machine Co.* v. *Davis*, 301 U. S. 548; *Helvering* v. *Davis*, 301 U. S. 619.

elderly and compensation to workers during periods of unemployment. Employment taxes, such as we are here considering, are necessary to produce the revenue for federal participation in the program of alleviation. Employers do not pay taxes on certain groups of employees, such as agricultural or domestic workers but none of these exceptions are applicable to these cases. §§ 811 and 907. Taxes are laid as excises on a percentage of wages paid the nonexempt employees. §§ 804 and 901; I. R. C. §§ 1410, 1600. "Wages" means all remuneration for the employment that is covered by the Act, cash or otherwise. §§ 811, 907; I. R. C. §§ 1426, 1607 (b). "Employment" means "any service, of whatever nature, performed . . . by an employee for his employer, except . . . agricultural labor *et cetera*." §§ 811 (b), 907 (c); I. R. C. §§ 1426 (b), 1607 (c). As a corollary to the coverage of employees whose wages are the basis for the employment taxes under the tax sections of the social security legislation, rights to benefit payments under federal old age insurance depend upon the receipt of wages as employees under the same sections. 53 Stat. 1360, §§ 202, 209 (a), (b), (g), 205 (c) (1). See *Social Security Board* v. *Nierotko*, 327 U. S. 358. This relationship between the tax sections and the benefit sections emphasizes the underlying purpose of the legislation—the protection of its beneficiaries from some of the hardships of existence. *Helvering* v. *Davis*, *supra*, 640. No definition of employer or employee applicable to these cases occurs in the Act. See § 907 (a) and I. R. C. § 1607 (h). Compare, as to carrier employment, I. R. C. § 1532 (d), as amended by P. L. 572, 79th Cong., 2d Sess., § 1. Nothing that is helpful in determining the scope of the coverage of the tax sections of the Social Security Act has come to our attention in the legislative history of the passage of the Act or amendments thereto.

Since Congress has made clear by its many exemptions, such as, for example, the broad categories of agricultural labor and domestic service, 53 Stat. 1384, 1393, that it was not its purpose to make the Act cover the whole field of service to every business enterprise, the sections in question are to be read with the exemptions in mind. The very specificity of the exemptions, however, and the generality of the employment definitions [6] indicates that the terms "employment" and "employee," are to be construed to accomplish the purposes of the legislation. As the federal social security legislation is an attack on recognized evils in our national economy, a constricted interpretation of the phrasing by the courts would not comport with its purpose. Such an interpretation would only make for a continuance, to a considerable degree, of the difficulties for which the remedy was devised and would invite adroit schemes by some employers and employees to avoid the immediate burdens at the expense of the benefits sought by the legislation.[7] These considerations have heretofore guided our construction of the Act. *Buckstaff Bath House Co.* v. *McKinley*, 308 U. S. 358; *Social Security Board* v. *Nierotko*, 327 U. S. 358.

Of course, this does not mean that all who render service to an industry are employees. Compare *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514, 520. Obviously the private contractor who undertakes to build at a fixed price or on cost-plus a new plant on specifications is not an employee of the industry thus served nor are his employees. The distributor who undertakes to market at his own risk the

[6] See 53 Stat. 1384, 1393, "The term 'employment' means any service performed prior to January 1, 1940, which was employment as defined in this section prior to such date, and any service, of whatever nature, performed after December 31, 1939, within the United States by an employee for the person employing him, irrespective of the citizenship or residence of either, except—." Compare 49 Stat. 639 and 643.

[7] Nothing to suggest tax avoidance appears in these records.

product of another, or the producer who agrees so to manufacture for another ordinarily cannot be said to have the employer-employee relationship. Production and distribution are different segments of business. The purposes of the legislation are not frustrated because the Government collects employment taxes from the distributor instead of the producer or the other way around.

The problem of differentiating between employee and an independent contractor or between an agent and an independent contractor has given difficulty through the years before social legislation multiplied its importance. When the matter arose in the administration of the National Labor Relations Act, we pointed out that the legal standards to fix responsibility for acts of servants, employees or agents had not been reduced to such certainty that it could be said there was "some simple, uniform and easily applicable test." The word "employee," we said, was not there used as a word of art, and its content in its context was a federal problem to be construed "in the light of the mischief to be corrected and the end to be attained." We concluded that, since that end was the elimination of labor disputes and industrial strife, "employees" included workers who were such as a matter of economic reality. The aim of the Act was to remedy the inequality of bargaining power in controversies over wages, hours and working conditions. We rejected the test of the "technical concepts pertinent to an employer's legal responsibility to third persons for acts of his servants." This is often referred to as power of control, whether exercised or not, over the manner of performing service to the industry. Restatement of the Law, Agency, § 220. We approved the statement of the National Labor Relations Board that "the primary consideration in the determination of the applicability of the statutory definition is whether effectuation of the declared policy and purposes of the Act comprehend securing to the individual the rights guaranteed

and protection afforded by the Act." *Board* v. *Hearst Publications*, 322 U. S. 111, 120, 123, 124, 128, 131.

Application of the social security legislation should follow the same rule that we applied to the National Labor Relations Act in the *Hearst* case. This, of course, does not leave courts free to determine the employer-employee relationship without regard to the provisions of the Act. The taxpayer must be an "employer" and the man who receives wages an "employee." There is no indication that Congress intended to change normal business relationships through which one business organization obtained the services of another to perform a portion of production or distribution. Few businesses are so completely integrated that they can themselves produce the raw material, manufacture and distribute the finished product to the ultimate consumer without assistance from independent contractors. The Social Security Act was drawn with this industrial situation as a part of the surroundings in which it was to be enforced. Where a part of an industrial process is in the hands of independent contractors, they are the ones who should pay the social security taxes.

The long-standing regulations of the Treasury and the Federal Security Agency (H. Doc. 595, 79th Cong., 2d Sess.) recognize that independent contractors exist under the Act. The pertinent portions are set out in the margin.[8] Certainly the industry's right to control how "work

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[8] Treasury Regulation 90, promulgated under Title IX of the Social Security Act, Art. 205:

"Generally the relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to *what* shall be done but *how* it shall be done. . . . The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other

shall be done" is a factor in the determination of whether the worker is an employee or independent contractor. The Government points out that the regulations were construed by the Commissioner of Internal Revenue to cover the circumstances here presented. This is shown by his additional tax assessments. Other instances of such administrative determinations are called to our attention.[9]

So far as the regulations refer to the effect of contracts, we think their statement of the law cannot be challenged successfully. Contracts, however "skilfully devised,"

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factors characteristic of an employer are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor, not an employee.

"If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if two individuals in fact stand in the relation of employer and employee to each other, it is of no consequence that the employee is designated as a partner, coadventurer, agent, or independent contractor.

"The measurement, method, or designation of compensation is also immaterial, if the relationship of employer and employee in fact exists.

"Individuals performing services as independent contractors are not employees. Generally, physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others who follow an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees." 26 C. F. R. § 400.205. See also Treasury Regulation 91, 26 C. F. R. § 401.3.

[9] The citation of these cases does not imply approval or disapproval of the results. The cases do show the construction of the regulation by the agency. *United States* v. *Mutual Trucking Co.*, 141 F. 2d 655; *Jones* v. *Goodson*, 121 F. 2d 176; *Magruder* v. *Yellow Cab Co.*, 141 F. 2d 324; *Texas Co.* v. *Higgins*, 118 F. 2d 636; *American Oil Co.* v. *Fly*, 135 F. 2d 491; *Glenn* v. *Standard Oil Co.*, 148 F. 2d 51.

See also note 2.

Lucas v. *Earl*, 281 U. S. 111, 115, should not be permitted to shift tax liability as definitely fixed by the statutes.[10]

Probably it is quite impossible to extract from the statute a rule of thumb to define the limits of the employer-employee relationship. The Social Security Agency and the courts will find that degrees of control, opportunities for profit or loss, investment in facilities, permanency of relation and skill required in the claimed independent operation are important for decision. No one is controlling nor is the list complete. These unloaders and truckers and their assistants are from one standpoint an integral part of the businesses of retailing coal or transporting freight. Their energy, care and judgment may conserve their equipment or increase their earnings but Greyvan and Silk are the directors of their businesses. On the other hand, the truckmen hire their own assistants, own their trucks, pay their own expenses, with minor exceptions, and depend upon their own initiative, judgment and energy for a large part of their success.

Both lower courts in both cases have determined that these workers are independent contractors. These inferences were drawn by the courts from facts concerning which there is no real dispute. The excerpts from the opinions below show the reasons for their conclusions.[11]

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[10] *Gregory* v. *Helvering*, 293 U. S. 465; *Griffiths* v. *Commissioner*, 308 U. S. 355; *Higgins* v. *Smith*, 308 U. S. 473; *Helvering* v. *Clifford*, 309 U. S. 331.

[11] *United States* v. *Silk*, 155 F. 2d 356, 358–9: "But even while they work for appellee they are not subject to his control as to the method or manner in which they are to do their work. The undisputed evidence is that the only supervision or control ever exercised or that could be exercised over the haulers was to give them the sales ticket if they were willing to take it, and let them deliver the coal. They were free to choose any route in going to or returning. They were not required even to take the coal for delivery.

"We think that the relationship between appellee and the unloaders is not materially different from that between him and the haulers. In response to a question on cross examination, appellee did testify that

Giving full consideration to the concurrence of the two lower courts in a contrary result, we cannot agree that the

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the unloaders did what his superintendent at the coal yard told them to do, but when considered in the light of all his testimony, all that this answer meant was that they unloaded the car assigned to them into the designated bin. . . .

"The undisputed facts fail to establish such reasonable measure of direction and control over the method and means of performing the services performed by these workers as is necessary to establish a legal relationship of employer and employee between appellee and the workers in question."

Greyvan Lines v. *Harrison*, 156 F. 2d 412, 414–16. After stating the trial court's finding that the truckmen were not employees, the appellate court noted:

"Appellant contends that in determining these facts the court failed to give effect to important provisions of the contracts which it asserts clearly show the reservation of the right of control over the truckmen and their helpers as to the methods and means of their operations which, it is agreed, furnish the test for determining the relationship here in question. . . ."

It then discussed the manual and concluded:

"While it is true that many provisions of the manual, if strictly enforced, would go far to establish an employer-employee relationship between the Company and its truckmen, we agree with appellee that there was evidence to justify the court's disregarding of it. It was not prepared until April, 1940, although the tax period involved was from November, 1937, through March, 1942, and there was no evidence to show any change or tightening of controls after its adoption and distribution; one driver testified that he was never instructed to follow the rules therein provided; an officer of the Company testified that it had been prepared by a group of three men no longer in their employ, and that it had been impractical and was not adhered to."

After a discussion of the helper problem, this statement appears:

"the Company cannot be held liable for employment taxes on the wages of persons over whom it exerts no control, and of whose employment it has no knowledge. And this element of control of the truckmen over their own helpers goes far to prevent the employer-employee relationship from arising between them and the Company. While many factors in this case indicate such control as to give rise to that relationship, we think the most vital one is missing because of the complete control of the truckmen as to how many, if any, and what helpers they make use of in their operations. . . ."

unloaders in the *Silk* case were independent contractors.[12] They provided only picks and shovels. They had no opportunity to gain or lose except from the work of their hands and these simple tools. That the unloaders did not work regularly is not significant. They did work in the course of the employer's trade or business. This brings them under the coverage of the Act.[13] They are of the group that the Social Security Act was intended to aid. Silk was in a position to exercise all necessary supervision over their simple tasks. Unloaders have often been held to be employees in tort cases.[14]

There are cases, too, where driver-owners of trucks or wagons have been held employees[15] in accident suits at tort or under workmen's compensation laws. But we

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[12] Cf. *Grace* v. *Magruder*, 148 F. 2d 679.

[13] I. R. C., chap. 9, subchap. A, § 1426 (b):

"The term 'employment' means any service performed . . . by an employee for the person employing him . . . except—

"(3) Casual labor not in the course of the employer's trade or business; . . ."

[14] *Swift & Co.* v. *Alston*, 48 Ga. App. 649; *Holmes* v. *Railroad Co.*, 49 La. Ann. 1465; *Muncie Foundry Co.* v. *Thompson*, 70 Ind. App. 157; *Chicago, R. I. & P. R. Co.* v. *Bennett*, 36 Okla. 358; *Murray's Case*, 130 Me. 181; *Decatur R. Co.* v. *Industrial Board*, 276 Ill. 472; *Benjamin* v. *Fertilizer Co.*, 169 Miss. 162.

[15] *Western Express Co.* v. *Smeltzer*, 88 F. 2d 94; *Industrial Commission* v. *Bonfils*, 78 Colo. 306; *Coppes Bros. & Zook* v. *Pontius*, 76 Ind. App. 298; *Burruss* v. *B. M. C. Logging Co.*, 38 N. M. 254; *Bradley* v. *Republic Creosoting Co.*, 281 Mich. 177; *Rouse* v. *Town of Bird Island*, 169 Minn. 367; *Industrial Commission* v. *Hammond*, 77 Colo. 414; *Kirk* v. *Lime Co. and Insurance Co.*, 137 Me. 73; *Showers* v. *Lund*, 123 Neb. 56; *Burt* v. *Davis-Wood Lumber Co.*, 157 La. 111; *Dunn* v. *Reeves Coal Yards Co., Inc.*, 190 Minn. 282; *Waters* v. *Pioneer Fuel Co.*, 52 Minn. 474; *Warner* v. *Hardwood Lumber Co.*, 231 Mich. 328; *Frost* v. *Blue Ridge Timber Corp.*, 158 Tenn. 18; *Lee* v. *Mark H. Brown Lumber Co.*, 15 La. App. 294.

See particularly *Singer Manufacturing Co.* v. *Rahn*, 132 U. S. 518.

agree with the decisions below in *Silk* and *Greyvan* that where the arrangements leave the driver-owners so much responsibility for investment and management as here, they must be held to be independent contractors.[16] These driver-owners are small businessmen. They own their own trucks. They hire their own helpers. In one instance they haul for a single business, in the other for any customer. The distinction, though important, is not controlling. It is the total situation, including the risk undertaken, the control exercised, the opportunity for profit from sound management, that marks these driver-owners as independent contractors.

No. 312, *United States* v. *Silk*, is affirmed in part and reversed in part.

No. 673, *Harrison* v. *Greyvan Lines, Inc.*, is affirmed.

MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS and MR. JUSTICE MURPHY are of the view that the applicable principles of law, stated by the Court and with which they agree, require reversal of both judgments in their entirety.

[16] Compare *United States* v. *Mutual Trucking Co.*, 141 F. 2d 655; *Glenn* v. *Standard Oil Co.*, 148 F. 2d 51.

SUPREME COURT OF THE UNITED STATES

Nos. 312 AND 673.—OCTOBER TERM, 1946.

The United States of America, Petitioner, 312 v. Albert Silk, Doing Business as Albert Silk Coal Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.
Carter H. Harrison, Individually and as Collector of Internal Revenue, Petitioner, 673 v. Greyvan Lines, Inc.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[June 16, 1947.]

MR. JUSTICE RUTLEDGE.

I join in the Court's opinion and in the result insofar as the principles stated are applied to the unloaders in the *Silk* case. But I think a different disposition should be made in application of those principles to the truckers in that case and in the *Greyvan* case.

So far as the truckers are concerned, both are borderline cases.[1] That would be true, I think, even if the so-called "common law control" test were conclusive,[2] as

[1] The opinion of the Circuit Court of Appeals in the *Greyvan* case stated, after referring to *United States* v. *Mutual Trucking Co.*, 141 F. 2d 655: "It is true that the facts of that case do not present as close a question as in the case at bar." And see note 3.

[2] It is not at all certain that either Silk or Greyvan Lines would not be held liable in tort, under application of the common law test, for injuries negligently inflicted upon persons or property of others by their truckers, respectively, in the course of operating the trucks in connection with their businesses. Indeed this result would seem to be clearly indicated, in the case of Greyvan particularly, in view of the fact that the trucks bore its name, in addition to other factors

the District Court and the Circuit Court of Appeals in each case seem to have regarded it.[3] It is even more true under

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including a large degree of control exercised over the trucking operations. For federal cases in point see *Silent Automatic Sales Corp.* v. *Stayton*, 45 F. 2d 471 (applying Missouri law); *Falstaff Brewing Corp.* v. *Thompson*, 101 F. 2d 301 (applying Nebraska law); *Young* v. *Wilky Carrier Corp.*, 54 F. Supp. 912, aff'd, 150 F. 2d 764 (applying Pennsylvania law). And see for a general collection of state cases, 9 Blashfield, Cyclopedia of Automobile Law and Practice (1941) § 6056.

Certainly the question of coverage under the statute, as an employee, should not be determined more narrowly than that of employee status for purposes of imposing vicarious liability in tort upon an employer, whether by application of the control test exclusively or of the Court's broader ruling.

[3] In the *Silk* case formal findings of fact and conclusions of law by the District Court do not appear in the record. But a "Statement by the Court" recites details of the arrangements with the truckers and unloaders in the focus of whether Silk exercised control over them and concludes he did not; hence, there was no employer-employee relation. The opinion of the Circuit Court of Appeals, though recognizing the necessity for liberal construction of the Act, treats the facts found in the same focus of control. The court was influenced by the regulations promulgated under the Act (Reg. 90, Art. 205) and also by the Bureau of Internal Revenue (Reg. 91, Art. 3). The opinion concludes: "The undisputed facts fail to establish such reasonable measure of direction and control over the methods and means of performing the services . . . as is necessary" to create the employer-employee relation. 155 F. 2d 356, 359.

In the *Greyvan* case formal findings and conclusions were filed. The Circuit Court of Appeals, accepting the findings, concluded they did not show "change or tightening of controls" after the company's adoption of a manual in 1940, although its provisions "if strictly enforced would go far to establish an employer-employee relationship. . . ." 156 F. 2d 412, 415. However, it found another factor conclusive: "While many factors in this case indicate such control as to give rise to that relationship, we think the most vital one is missing because of the complete control of the truckmen as to how many, if any, and what helpers they may make use of in their operations." 156 F. 2d at 416. Apparently not control of the method of performing the work in general but absence of expressly reserved right of control in a single feature became the criterion used

the broader and more factual approach the Court holds should be applied.

I agree with the Court's views in adopting this approach and that the balance in close cases should be cast in favor of rather than against coverage, in order to fulfill the statute's broad and beneficent objects. A narrow, constricted construction in doubtful cases only goes, as indeed the opinion recognizes, to defeat the Act's policy and purposes *pro tanto*.

But I do not think it necessary or perhaps in harmony with sound practice, considering the nature of this Court's functions and those of the district courts, for us to undertake drawing the final conclusion generally in these borderline cases. Having declared the applicable principles of law to be applied, our function is sufficiently discharged by seeing to it that they are observed. And when this has been done, drawing the final conclusion, in matters so largely factual as the end result must be in close cases, is more properly the business of the district courts than ours.

Here the District Courts and the Circuit Courts of Appeals determined the cases largely if not indeed exclusively by applying the so-called "common law control" test as the criterion. This was clearly wrong, in view of the Court's present ruling. But for its action in drawing the ultimate and largely factual conclusion on that basis, the error would require remanding the causes to the District Courts in order for them to exercise that function in the light of the present decision.

I would follow that course, so far as the truckers are concerned.